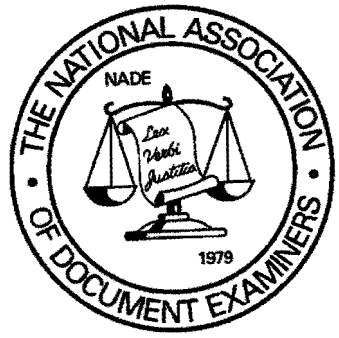

Journal of the National Association of Document Examiners

Volume 31, Spring 2013

Contents:

Journal of the National Association of Document Examiners

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Editorial

by

Reed Hayes, CDE

As Editor-in-Chief, I'm pleased to be at the helm as we publish the first digital-only edition of the NADE Journal. With this move forward, the Journal will have a broader potential audience which will ultimately benefit the authors as well as NADE itself.

This issue opens with attorney Isaac Zfaty's article "Expert Witness Practice—Basic Tips for Becoming a Better Expert." As one of California's highly successful trial practitioners who has worked with numerous expert witnesses, Mr. Zfaty offers suggestions to help experts "navigate the sometimes turbulent cross-examination waters." He stresses the importance of knowing the Federal Rules of Evidence as they apply to experts in order to reinforce one's testimony. Mr. Zfaty reminds us that being an expert witness is one of the highest professional callings one can have, and he delivers valuable tips to enhance and uphold that calling.

In the next article, "Composing the Expert's Report: Factors for Compliance with Federal Rule 26(a)(2)(B)," Jacqueline Joseph details the mandatory requirements of the Federal Rules of Evidence as they pertain to written reports. She gives examples of pitfalls to avoid, cautioning experts that an improperly prepared report may be the basis for being barred from rendering testimony. As one's report becomes part of a permanent record, it requires special attention and consideration.

Ms. Joseph's article dovetails nicely with Marcel Matley's contribution, "There is More to *Daubert* Than *Daubert*—Explanations and Critical Commentary as Illustrated Principally Through Handwriting Expertise." This extensive and astutely written piece surveys the *Daubert* criteria and what is required of an expert witness to satisfy the criteria as well as how to meet the requirements of the applicable Federal Rules of Evidence. Mr. Matley discusses in detail experts' qualifications, whether evidence is relevant and reliable, rules restricting evidence, and expectations and formatting for the expert's report. The paper concludes with Matley's model of an expert's written report that supports Ms. Joseph's recommendations for properly rendering written opinions. Given the wealth of information in this article, it deserves to be read a number of times.

Pnina Arieli's article pertains to Israeli court opinions concerning handwriting experts and document examiners. Ms. Arieli states that in Israel, document examiners are often referred to as "judicial graphologists" as well as "handwriting experts" (either term is acceptable in Israel).

The last two articles in this issue are derived from actual cases and serve to illustrate some of the "nuts and bolts" of the forensic handwriting examination arena. My own case study, "Deception and Forgery on Maui," demonstrates the evaluation and analysis of forged documents which essentially resulted in depleting the estate of one Michael Mason, terminally ill and vulnerable. The case fortunately had a positive outcome, due largely to testimony regarding the fraudulent documents.

The final piece, "Case Study: Handwritten Confessions in a Murder Trial," is by Patricia Siegel. Ms. Siegel opined that the questioned confessions were not written by investigating detectives as the defendant claimed, but by the defendant himself.

These two articles "from the trenches" illustrate one type of material that other NADE members might submit for publication in future issues of the Journal. Other potential pieces include research papers, book reviews, and annotated bibliographies on any handwriting or document examination topic. We also welcome and encourage pertinent articles from colleagues outside of NADE.

Should potential authors have ideas for articles,

the editorial board is available to assist in the development of any appropriate material. Members may refer to the submission guidelines in the closing pages of this issue for requirements as to subject matter, formatting, etc.

I want to take the opportunity to extend appreciation to my editorial committee members for their diligent work on this issue. They have labored tirelessly and voluntarily in reviewing articles for content and appropriateness as well as suggesting edits and assisting authors with re-writes. They have also given invaluable input with respect to the Journal's new digital direction.

Reed Hayes, CDE
http://www.reedwrite.com

Expert Witness Practice – Basic Tips For Becoming A Better Expert

by
Isaac R. Zfaty, J.D.

Abstract: This article explores a variety of items that an expert witness should consider during preparation for trial and also during testimony. Experts can become more competent by understanding critical facts of the case at hand as well as the retaining attorney's trial theme. To be more compelling and believable on the witness stand, experts should deal with any imperfections or "bad facts" honestly and up front. When they are familiar with the evidence code in their particular jurisdiction, their testimony will be enhanced and the strain of cross-examination will be lessened. Experts will also be more successful on the witness stand if they adhere to pertinent testimony and do not go out on a limb, which could jeopardize the outcome of the case.

Key Words: Expert witness, Testimony, Cross-examination, Trial tactics, Federal Rules of Evidence sections 702 and 703

Expert witness practice is an important—and oftentimes, decisive—part of any lawsuit. Expert witness practice dates back to Old English Common Law and, though it has evolved over the past few centuries, experts have always been retained and called upon to testify about areas that require special knowledge, skill, experience, training, and/or education. In many cases, the expert will be pitted against another expert who claims to have equal or better training and experience or who has a more defensible interpretation of the evidence as presented. Because this is so, it is critical for anyone who includes expert witness practice as part of his or her professional activities to learn about the dos and do nots of expert witness testimony.

The practice of testifying as an expert witness includes many important skills. The most important, of course, is a complete understanding of the subject matter. But a testifying expert should understand trial themes, because unlike subject studies, trial testimony involves an audience who will make decisions based upon perception. Judges and juries are forced to make decisions about parties, their positions, their credibility, and their retained expert's testimony within the strict confines of the rules of evidence, and the ever more strict constraints of time (and with recent budget cuts, judges do not allow their courtrooms to be tied up for any longer than absolutely necessary). Entire treatises have been written about courtroom demeanor and the effect it has on jurors. This article will not touch upon every tip for trial testimony, but it will explore the basics of understanding the trial theme and the key facts of the case, as well as the pitfalls that may inhere if a testifying expert does not understand the theme and facts.

The Trial Theme

If you take just one thing from this article, it should be this: know your trial lawyer's trial theme before you leave your first retention meeting.

Every trial lawyer worth his or her salt has a theme, also known as a "theory of the case." Simply put, a theme is the reason that one side wins and the other side loses. A good theme is simple and easy to understand. It is one that a jury of our peers can relate to and quickly absorb.

At the very first meeting with the retaining attorney, the expert should understand the theme of the case. Often, lawyers take for granted that an expert either organically understands the theme or, more commonly, does not need to know the theme. This is folly. An expert should *always* have the retaining attorney explain the critical facts to him, and articulate the theme in a few sentences. Failure to do so can be a case-threatening mistake. Experts are routinely brought into a case late in the game. (The reasons for this are noble enough—attorneys do not want to spend client funds if it can be avoided—and most cases settle before they reach the trial stage.[1]) The far better practice is for attorneys

1 The vast majority of lawsuits that are filed settle out of

to retain experts early on in the case so the experts can help develop the trial theme.

The expert should assist the retaining attorney to better understand the scientific or technical issues, so that *together* they can formulate the trial theme. Financial constraints sometimes prevent this, but whenever the expert is retained, he or she should quickly get a firm understanding of the nature of the theme. A failure of theme usually means a loss at trial.

Get Comfortable With The Facts Of The Case and The Scope Of Your Testimony

Attorneys often call the witness stand the "hot seat." That seat can be HOT and if the opposing attorney is doing his job well, he is shoveling coals at a frenetic pace. When I lecture to both expert witnesses and attorneys—and also when I prepare percipient witnesses for trial testimony—I almost invariably get the same question: "What can I do to not be so nervous up there?"

This, of course, involves physiological issues regarding which I am ill-equipped to offer an opinion. But I know enough about human nature to know this: if we are speaking in front of others, we do not want to look like idiots or liars.

The single most important thing an expert witness can do to ensure that he does not look like an idiot or a liar is to have a firm understanding of the parties' themes and the relevant facts. If an expert understands what each side is trying to accomplish—and more importantly, *how* they are trying to accomplish it—the testimony part becomes much easier. When the witness is on cross-examination, opposing counsel will surely set traps for him (in fact, will likely have already set them during deposition). If the expert understands the terrain, he will be able to sniff out the ad hoc trial traps that have been set.

As for those traps that are set by opposing counsel at deposition, the witness and his attorney should work through them and understand how to best deal with them before trial. No case is a perfect case; they all have their problems and imperfections. The expert must know the weaknesses and imperfections of his testimony. If he is struggling with a particular piece of evidence, he should figure out how to deal with it before getting on the hot seat. The expert may ultimately decide that a bad fact is so insurmountable that he needs to just "own it." He should remember that, during some of his testimony, the jury may be sleeping. He must not give the opposition an opportunity to get out the highlighter and highlight an area where his testimony was just plain incredible.

I recently tried a case where two banking experts were offering conflicting testimony about the standard of care relating to the acceptance of checks for deposit, and what needed to be included before the bank could, under the Uniform Commercial Code (U.C.C.), accept a check for deposit (e.g., endorsement on the back of the check, presence of the depositor at the bank, whether the depositor was the owner of the account or simply the person making the deposit, etc.) The expert on the other side agreed with my expert that, as to half of the checks that were at issue in the case, there was clearly a problem, and the bank should not have accepted them. She was conceding half of the checks, but as to the other half, she found what I thought was a defensible distinction. It was an excellent trial strategy. It was damage control which could have cut our damages in half, if it had worked.

This expert owned the bad facts and dealt with the ones where she had a puncher's chance. The trial strategy did not ultimately work (the jury awarded my client the value of all of the checks, not just half). But it was clear that this expert was comfortable with her testimony because she did not have to strain to render an opinion that would have been ridiculous (that the checks were all acceptable). Whereas she very easily could have tried to find some reason why all of the checks

court. In California for instance, the statistics are typically in the high 90% range. So, sadly, it is highly unlikely that your dispute will ever make it to an actual trial. Further, the 90% figure gets staggeringly large when you factor in that there are millions of disputes that happen every day that never result in the filing of a lawsuit. An expert can rest assured that if a dispute has reached the point of trial: 1. The parties usually hate each other; 2. The lawyers are wary of one another because they have been fighting it out for over a year; and 3. The parties are so committed to their respective positions that they are willing to pay their lawyers what usually amounts to a king's ransom to do their best to win.

could be accepted for deposit under the U.C.C., she would have been extremely uncomfortable when I started cross-examining her. Instead, she held her head up and testified honestly that there was a difference between the categories of checks. Consequently, her seat was not nearly as hot. Post-trial jury questioning revealed that the jury deliberated on whether they would award us half, or all, of the checks. She gave her attorneys a puncher's chance.

If the expert witness gets comfortable with the themes and the facts of the case, he will testify clearly, concisely and, most importantly, with a clear mind. And if he understands the imperfections of his testimony and deals with them, he will be far more compelling and believable.

Know The Evidence Code

Expert witnesses are not typically attorneys, nor are they legally trained. But the best experts with whom I have worked have a firm understanding of the basic rules of evidence pertaining to expert witness practice. Regardless of the expert's jurisdiction, the code has a dedicated expert witness practice section. It is not very long and the expert would be wise to take the time to learn it and commit the important parts to memory.

I liken this to the rules of poker. You would not sit down at a poker table without knowing that a flush beats a straight or that you are supposed to bet in order. If you did, you would be devoured quickly by the players who did know the rules and who would take advantage of your naiveté. The same goes for trial. You do not need to know all of the rules of evidence that are used at trial, but you should know the ones that have been tailored to you. The more an expert witness knows about the practice of law, the better he or she will be able to navigate the sometimes turbulent cross-examination waters.

The applicable Federal Rules of Evidence for expert witness practice are located at sections 702-706.[2] There are many websites that publish the full text of these sections for free. The most important sections are Federal Rules of Evidence sections 702 and 703, which provide as follows:

Section 702:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Section 703:

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

There are three particularly important points:

Expert witnesses are special. And not in the Fred Rogers sense. The expert is someone who has knowledge, skill, experience, training, etc. that allows him to weigh in on a particular area where no one else can, *or may*, testify. He is the authority on the subject. He should act like it and be definitive in his answers whenever possible. And when he cannot be definitive, he should explain the nuances in a scholarly way.

Percipient witnesses do not get to testify about their opinions. Just the facts. Experts get to tell the jury their opinions about certain issues in the case. That is because they are experts in their field, and their opinions count. So, unlike what Mr. Rogers

2 Know in advance which jurisdiction governs your trial testimony. The Federal Rules of Evidence apply in all Federal Courts. If you are testifying in State Court, that state's rules will apply. Though the rules are almost the same across states (and they parrot the Federal Rules), there are some nuances, so make sure you are studying the right rules. The retaining attorney will be able to guide you in this regard.

taught us, everyone is *not* special when it comes to trial testimony. But the expert witness *is* special.

Experts can rely upon inadmissible evidence. No one else gets to do this. When doing so, the expert ought to make sure that it is good inadmissible evidence ("I am relying upon such-and-such a treatise which is endorsed by NADE and other highly reputable document examining associations around the nation.") and not bad inadmissible evidence ("I heard Harvey Levin talking about this last night on TMZ.").

A good working knowledge of the rules of the game is important. And if you enjoy the theory, I would encourage you to review the history of expert witness practice in English and American law. You may be surprised at how expert witness practice has evolved in our never-ending search for the truth—and a more perfect system to get at the truth.

Do Not Go Out On A Limb

The expert must not go out on a limb. This bears repeating. Do not go out on a limb. Ever. Never, ever, ever.

Expert witnesses must be confident, but not arrogant. They should be secure in their opinions based upon a mastery of their craft, the trial themes, the facts, the applicable evidence code, and any imperfections. Experts testify before 9-15 humans who are going to decide the fortunes of two or more competing parties. They should sound scholarly, but not superior. In addition to potentially alienating the jury, arrogance might lead one to a pitfall that can only be accomplished by the haughtiest of experts: going out on a limb. Only pure hubris can lead the witness to this particular part of the tree, and he must stay away from it. Testify about what you are there to testify about. Be concise and expand only when necessary to add color to your testimony. The pitfall of going out on a limb can be best explained through the following anecdote.

I recently represented a defendant in an unlawful foreclosure case. The case lasted over a month, and it involved five different testifying experts. My opponent was a well-known plaintiff's trial attorney/Orange County politician who was known for putting arrogant experts on the stand. The first expert he called was also an attorney who was supposed to be an expert in titles, foreclosures, and lock-outs. He testified for two days. While he was testifying, it felt like two weeks, until the end of the second day.

Toward the end of the second day of his testimony, this expert was feeling quite comfortable (as well he should have—he was playing pitch and catch for a full day and a half on the stand with his attorney, and without any cross-examination). The second half of day two was going to be mine. But at the end of the expert's direct examination he made a mistake that, in my view, probably sealed the fate of the plaintiff. And in retrospect, the mistake could not possibly have had anything to do with his attorney, as you will soon see.

The expert was testifying about the lock-out process and how he knew everything there was to know about lock-outs, including if and when sheriffs will draw their guns to physically remove an owner who refuses to leave his home after lock-out. He testified well. He spoke about how guns are *never* drawn. He testified that the drawing of guns at a lock-out was so unusual that it could only have been the result of a malicious request made by my client.

And then—here it comes—he stated 21 hubristic words that were manna from heaven: "The *only* reason a sheriff would draw his gun during a lock-out would be if the person was a convicted felon!" I was exuberant. No, that's not a strong enough word. I was outright manic. It was all I could do to stay in my seat.

This little embellishment was intended to make my client look *really* bad. This poor plaintiff who had lost his home (never mind that he hadn't paid his mortgage in almost three years) was subjected to a gun being pointed at him during the lock-out. It was horrible. It was uncommon. It was unnecessary. It was *malicious*. The problem was, the plaintiff was a felon.

And I had been trying—and failing up until that point—to get this felony in front of the jury. It was for the sale of cocaine to an undercover police officer. And then he violated his parole, eight times by testing positive for coke.

Under California Evidence Code section 352,

the judge had the right to exclude this evidence from this civil trial on the basis that it was "too dangerous" and would have an inflammatory effect upon the jury. Without the magic 21 words, the jury would never have heard about this conviction. The plaintiff would have been this poor old man who looked sweet enough and whom the jury should just feel sorry for (even though he didn't pay his mortgage), and find in his favor. Fact was—he was a deadbeat coke dealer.

I'll say it again: Do not go out on a limb. The expert witness may think he is helping the retaining attorney by embellishing—and he may well be. He also may be uttering the words that will completely and irretrievably bury his case. At a minimum, before the expert includes unnecessary hyperbole, he should run it by the retaining lawyer who may have other ideas.

Closing

Being an expert witness is one of the highest callings a professional can have. You are a luminary and you are establishing a standard of care by providing a requisite fact and/or simplifying an otherwise complicated matter. The legal definition of an "expert witness" tells you everything you need to know about the law's opinion of you. You are not just versed. You don't dabble. You are an expert. If you work hard at your craft by ensuring you understand the retaining attorney's theme, the evidence code, and any imperfections in your testimony—and you emphasize preparation over all else—you will find success as an expert witness. And like the attorneys who retain you, you will also achieve the ultimate success: helping to ensure that justice prevails for your client.

Isaac R. Zfaty is a founding partner of ZfatylBurns, a law firm located in Irvine, California. He specializes in business litigation, partnership and corporate disputes, and general real estate matters. Mr. Zfaty has achieved outstanding results as both a plaintiff and defense attorney with over 200 trial days under his belt.

Prior to founding ZfatylBurns, Mr. Zfaty worked as a civil litigator in both large and small corporate law firms. He has tried cases throughout Southern California and provided legal counsel in numerous other states, Europe, and the People's Republic of China. He also acts as general counsel for a number of small to mid-sized Orange County, California companies.

As one of the most successful trial practitioners in California, Mr. Zfaty was responsible for two of the fifty largest jury verdicts in the state in 2009. One of his trial successes was featured in Forbes (12/2/09, Forbes Business Wire).

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Composing the Expert's Report: Factors for Compliance with Federal Rule 26(a)(2)(B)

by
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Abstract: The recently amended Rule 26 is the result of a proposal made by the Committee on Rules of Practice and Procedure. Approved by Congress, it became effective on December 1, 2010.

This article is a discussion of the section of Rule 26 governing written reports by experts. The FRPC requirements and elements for the expert's written report are featured. Further suggestions about formatting the report, based on the author's experience and study, are detailed. Non-compliance issues are also discussed.

For a complete discussion about the 2010 amendments, visit http://www.apps.americanbar.org/litigation/committees/trialevidence/articles/042811-expert-witness-rule-amendments.html

Introduction

Rule 26 provides guidelines to the discovery process and flow of information between the expert and the client-attorney. In civil lawsuits, the United States district courts' procedures are governed by the Federal Rules of Civil Procedure (FRCP). Any court may have its own additional requirements regarding report writing and these requirements would be available from the court clerk or your client. (See sidebar: Rule 26. General Provisions Governing Discovery; Duty of Disclosure.)

While the rules vary from state to state, at least 35 states have adopted procedural codes based on the Federal Rules, sometimes with slight and time-critical variations. The FRCP applies only to matters being tried in Federal Court.

The FRCP are only mandated for expert witnesses retained to testify. However, you may be required to provide a written report in some cases. The reasons for requiring expert reports include the elimination of unfair surprise to the opposing party, the avoidance of unnecessary deposition, and the reduction of the costs of litigation. Most fundamentally, in some situations you may be barred from testifying if your requested report does not meet the requirements of Rule 26.

Author's Note: The Federal Rules of Civil Procedure (FRCP) are published in the official U.S. Code in the appendix to Title 28, Judiciary and Judicial Procedure. This portion (26(a)(2)(B) discusses the expert's report. For the complete rule, visit http://www.law.cornell.edu/rules/frcp/

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(2) Disclosure of Expert Testimony.

(A) [This section omitted for the purpose of this discussion]

(B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

Source: Cornell University Law School. Accessed 3/25/13 at http://www.law.cornell.edu/rules/frcp/

Discussion

The following discussion covers further considerations and suggestions about writing a detailed and complete expert report. Be aware that your report becomes part of your "permanent record," and must be prepared and signed by you.

In addition to the components specified in Rule 26(a)(2)(B), compose your report to include the following:

- The specific issues your client has asked you to address
- In cases involving signature comparisons, state the theoretical basis required for a finding of genuineness or falsity as expressed by the generally accepted authorities in the field of forensic document examination. Ordway Hilton's book, Scientific Examination of Questioned Documents, revised edition, 1982, is a good source.

More specifically, in considering sections of Rule 26(a)(2)(B)(i) through (vi), the author recommends the following:

For Rule 26(a)(2)(B)(i), stating your methodological basis would include a clear delineation of the set of established guidelines and standards you used in determining the sufficiency of the evidence; the details of your step-by-step process; the reliability testing you performed; and the equipment used to examine the evidence. In cases involving signature comparisons, exemplar sufficiency is discussed in detail in "Limited Exemplars and Their Use in Forming Expert Opinions," NADE Journal, Fall 1999, pp. 2-5.

Also, consider providing a bibliography listing the relevant authorities and research reports upon which you relied in forming your opinion(s) and attach it to your report as an appendix. For more information about properly formatting a bibliography, go to http://www.chicagomanualofstyle.org and search for "bibliographies."

For Rule 26(a)(2)(B)(ii), include the facts or reliable data you considered in forming your opinion(s). For example, compose an accurate list of documents examined with specific information observed such as:

- A specific date indicating when an entry/signature was written
- An observed date establishing when the document was originated
- Page number, Bates number, or other unique identifying number
- Handwritten signature(s) including the wording configuration(s)
- A notary seal and its date of notarization
- Specified version (an original, color photocopy, faxed copy, or other)
- Binding (staples, spiral, hole punch, paperclipped, or other)
- Size, color, and type of paper
- Two-sided or single-sided copy

For Rule 26(a)(2)(B)(iii), incorporate your exhibits in your written report as attachments or appendices. They are the observational bases of your opinion and illustrate your findings. In composing your exhibits, include the source and date of illustrative portions of each document, the percentage that the image has been resized for illustrative purposes, the date your exhibits were prepared, and the name of the specific case. Attach a copy of each source document for verification purposes.

Additionally, to satisfy Rule 26(a)(2)(B)(iv),

(1) The most efficient way to present your qualifications is by including a current resume that accurately summarizes your professional accomplishments. For composing and publishing your resume, a complete quality control checklist, describing what to include and what to avoid, can be found on page 405 of *The A-Z Guide to Expert Witnessing* by Steven Babitsky, Esq., James J. Mangraviti, Jr., and Alex Babitsky, MBA. SEAK, Inc. Falmouth, MA, 2006.

(2) In addition to the above requirement, you are required to compose a list of all of your professional publications. Be sure to provide complete bibliographic information.

To satisfy Rule 26(a)(2)(B)(v), compose and attach a list of all other cases in which, during the previous four years, you have testified as a foren-

sic document examiner at trial or by deposition. Failure to maintain and disclose this information accurately may be the basis of having your testimony stricken. Cases in which you did not testify do not need to be included. For each case listed, include the following:

- Title of the case and case number
- Name and location of the court
- Date of testimony
- Name of judge

Rule 26(a)(2)(B)(vi) also requires an accurate statement of the compensation to be paid for your study and testimony in the present case, which would include:

- A copy of your current fee schedule or engagement letter for the specific case
- A case-specific invoice for the fees, expenses, and estimates of time for future work

Composing Your Report

Your report should be easy to read and look professional. It is wise to have a competent copy-editor proof your report for spelling, grammar, and overall clarity. Additionally, consult the court clerk at the courthouse where the case is to be heard since they may have their own specific and additional requirements. Depending on the nature and scope of your commission, consider:

- Using your professional letterhead
- Using 12-point font (Arial font is suggested) and 1½ line spacing
- Creating topic headings and short, concise paragraphs
- Providing a unique number for each page, table, chart, and exhibit
- Including a cover page and table of contents
- Indicating when and by whom your report was requested
- Including the date you received the documents and formed your opinion
- Stating that you may have additional opinions or updated/revised opinions if new information/documents are provided
- Defining technical language and explaining any abbreviations
- Including a summary of your conclusions/ opinions

Non-Compliance Issues And Cautions

Written reports that are not in compliance may become the basis for your testimony being barred. You are cautioned against using:

- Absolute wording and phrasing
- Terminology such as "including, but not limited to," and "relevant portions of"
- Hedge words or phrases such as "sort of," "somewhat," or "I suppose"
- Argumentative language
- Comments on the credibility of other witnesses
- An informal or too friendly tone
- Any issues the attorney did not want addressed
- Opinions outside your expertise or on issues(s) you were not asked to address

Summary

The FRCP 26(a)(2)(B) provides the basic requirements, from the Federal court's perspective, for the expert's written report. If an expert fails to meet these requirements, the opposing party may move to exclude the expert's testimony and/or report. But following the FRCP requirements alone is not enough. As stated above, an expert can include other elements that will further enhance one's professionalism and enable a comprehensive understanding of reliability. This will reduce the chance of being barred from testifying because of an insufficient report.

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Jacqueline A. Joseph, B.A., CDE, D-BFDE, a re-certified member of NADE, was awarded accredited certification by the Board of Forensic Document Examiners. As a practicing forensic scientist since 1992, she has contributed to the field of questioned document examination in various ways. For instance, by compiling several subsequently published annotated bibliographies relating to questioned documents on topics including: genuine versus fraudulent tremor; left-hand and opposite-hand writing features; handwriting disguise; and Chinese handwriting examination. Her poster presentation, "Signature Forgery: An Uncommon Amalgamated Method Fails" was featured at the World Congress of Forensics 2011 in Chongqing, China.

Her other published papers include "Identifying the Maker of Handwritten Numerals," "The Unidentifiable Handwriting – An Anonymous Note Case Study," "Limited Exemplars and Their Use in Forming Expert Opinions," and "The Layman's Glossary of Terms Relating to the Forensic Examination of Handwriting, Signatures and Documents." Additionally, she has produced an educational DVD presentation "Extreme Handwriting Caught-on-Tape" showing simultaneously ambidextrous handwriting, reverse mirror writing and other extremes. She has also collaborated with Marcel B. Matley in the research, production and presentation of two DVDs: "The Two Pillars of Individuality and Identifiability in Handwriting" which was approved for academic credit at East Tennessee State University Department of Criminal Justice and Criminology, and "Book Smarts for the Document Examiner Featuring the QDE Index."

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There Is More to *Daubert* Than *Daubert*: Explanations and Critical Commentary as Illustrated Principally Through Handwriting Expertise

by
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Abstract: This *commentary* surveys the *Daubert* criteria and how an expert witness can satisfy them as well as applicable Federal Rules of Evidence. Quotes from the Federal Rules of Evidence are given. Citations to case reports illustrate the rulings various courts have made regarding the *Daubert* criteria and Federal Rules of Evidence. A model report is given in the appendix.

Key Words: *Daubert v. Merrell Dow Pharmaceuticals, Inc.*; Handwriting expertise; Expert witness; Federal Rules of Evidence; Reliability; Peer review; General acceptance; Qualifications; Relevance; Voir dire; Expert reports; Publication; Admissibility; Rate of error; Specificity of qualifications.

Prefatory Remarks: I am not an attorney and I offer no legal advice, nor is anything herein represented as sufficiently reliable upon which one can base anything offered in any legal setting. This is a layperson's perceptions of how law and rules may affect the admissibility of the expert witness and the proffered testimony. Only a licensed attorney can offer proper counsel as to how the law may apply to your cause at court or to any evidence you might offer in support of your cause.

Some of the cases cited in this paper are unpublished, meaning they cannot be cited as legal precedents. They are offered as historical facts that illustrate application of the law and rules to a particular situation. In this way they have didactic value for both attorneys and expert witnesses.

I. INTRODUCTION

A. Overview

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786 (1993), is the U.S. Supreme Court case governing admissibility of expert witnesses in Federal Courts. In *Daubert* the Supreme Court did what courts of appeal have probably done since the inception of the very first one. It created new law and pretended everyone should have known about it and applied it as old law, although the newness of it all forced the Supreme Court later to make multiple clarifications as to what its *Daubert* decision meant. These clarifications hardly match in volume the multifarious interpretations legal scholars and lower courts of law have issued as to meaning of the various pronouncements in *Daubert* and its clarifications. Many legal scholars are so sure of what their own opinions about *Daubert* are that even explicit statements by the Supreme Court to the contrary are no deterrence to the repeated assertions of scholarly opinions.

However, making of new law by courts is like making fine sausage in slaughter houses. When the aromatic, tasty and eye-appealing sausage arrives on one's plate in an elegant restaurant, one does not avert to the messy and nauseous nature of the process leading from animal-on-the-hoof to savory meat on the plate. Thus it is in this exploration into *Daubert*.

Ultimately the focus will be on the finished and refined product.

B. The Rule Permitting Handwriting Expert Testimony

Federal Rule of Evidence 901 provides:

Requirement of Authentication or Identification

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the

matter in question is what its proponent claims.

(b) Illustrations.

(c) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

This rule provides a gate by which one can introduce a handwriting expert into a court trial, just as any witness must be provided with some legitimate gate. Whether this gate is open to a particular expert in a particular case is another matter. Rules for admissibility tell the proffering party how to persuade the judge to open the gate to let the expert witness in. The law gives the trial judge great latitude, called judicial discretion, in deciding whether the rules for opening the gate are sufficiently satisfied. Generally, absent clear proof upon appeal of abuse of discretion, the trial court's ruling will stand. Since this paper is restricted to the trial level itself, there will be no discussion of rules and practices upon appeal. Let this suffice: Generally, mastery and satisfaction of the rules for admission of expert evidence should make a litigant's expert evidence admissible at trial. If not, making a clear record at trial to preserve any perceived error for appeal as the rules require might yet save the case.

Thus, in *General Electric v. Joiner*, 522 US 126, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997), it was held that the trial judge is the gatekeeper for admissibility of scientific expert evidence, and a ruling in that regard is reversible only for abuse of discretion, that is, acting unreasonably in a way totally unsupportable by law. Ideally, if at trial one explicitly satisfies all the rules and guidelines discussed herein, refusal of admission of one's expert evidence might be such an abuse of discretion. The ideal is one thing; the reality can be quite another.

C. What Will Be Discussed

This paper will be constituted of the following sections dealing with various aspects of evidence by expert witnesses:

- Expert's qualifications
- Relevance
- Reliability
- Rules restricting evidence
- The expert's report

D. A Note on Pronouns

I will refer to the trial attorney as a lady and the expert witness as a gentleman, although we all know that not all attorneys and experts are ladies and gentlemen. Thus the male pronoun will always refer to the expert witness and the female pronoun to the attorney.

II. EXPERT'S QUALIFICATIONS

A. General Qualifications in the Field of Endeavor

1. The Applicable Rule: The Five Factors

The first part of Federal Rule of Evidence 702 provides:

Testimony by Experts: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by *knowledge, skill, experience, training, or education*, may testify thereto in the form of an opinion... [Emphasis added.]

Five ways of qualifying are given, but the essential is that specialized knowledge must be shown. Thus in *Longoria v. McAllen Methodist Hospital*, 771 S.W.2d 663 (Ct App. Tex. 1989); reversed after remand, *Longoria v. United Blood Services*, 907 S.W.2d 605 (Ct App. Tex. 1995); reversed and rendered, *United Blood Services v. Longoria*, 938 S.W.2d 29 (TX 1997), both the relation of the other four ways and the trial court's wide discretion are expressed. In 907 SW2 605, at pages 612-613, the proponent's burden to show the proffered expert to be qualified is to prove:

[H]igher degree of knowledge than an ordinary person or the trier of fact...This burden may be met by showing that the expert is trained in the science of which he or she testifies or has knowledge of the subject matter of the fact in question...Generally, however, there are no

definite guidelines to determine whether a witness's education, experience, skill, or training qualifies the witness as an expert, and such a determination is left to the trial court's discretion.

2. The Biggest Word: The Little "or"

Courts have ruled that use of the word "or" makes the five ways of Rule 702 completely disjunctive. An expert need qualify only under one of the five, provided such satisfies the trial judge, which is a very large and problematic proviso. Thus *72 Criminal Law Reporter*, 548-9 (March 19, 2003), reports regarding *U.S. v. Frazier*:

Qualification of an expert does not depend on a scientific background, the majority stressed... [T]he Supreme Court extended *Daubert*'s application from "scientific testimony" to "all expert testimony" so that science is no longer the sine qua non of analysis under *Daubert*. This makes sense, the majority noted, in view of the disjunctive language of Rule 702.

See: *U.S. v. Frazier*, judgment of trial court vacated and case remanded for new trial, 322 F.3d 1262 (11 Cir 2003); opinion vacated and hearing in blanc granted, 344 F.3d 1293 (11 Cir 2003); affirming judgment of trial court, 387 F.3d 1244 (11 Cir 2004).

The various states of the Union that have the same wording in their Rules of Evidence as do the Federal Rules of Evidence have the same interpretation. For example, *Carter v. State*, 5 S.W.3d 316 (TX App. Houston 1999), at page 319 states:

Although we have not found a decision from the Texas Court of Appeals, we have found numerous cases from the federal courts stating that a witness may be qualified on the basis of only one of the five qualifications listed in Rule 702—including practical experience.

Seven federal illustrative cases are cited. Footnote 2 observes that "the Texas Court of Criminal Appeals has approved the practice of interpreting Texas Rules in accordance with Federal Rules where the wording is the same."

The bottom line is whether or not the trial judge has been persuaded that the proffered expert witness definitely knows what is needed to be known to help resolve the expert fact in issue.

3. How to Satisfy the Five Factors

An attorney should be sure that her expert witness has a segment on his CV explicitly covering each of the five ways to qualify. A prudent expert will then pursue what he is weakest in. Knute Rockney, the most famous coach of American football at University of Notre Dame, was once asked why his teams were so strong. He replied that they identified their weakest point and worked on it until it became their strongest point.

B. Specific Qualifications in the Fact in Issue

1. The Balance of Rule 702

The rest of Rule 702 states:

[O]r otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

This wording was added to Rule 702 to incorporate the provisions of *Daubert* and its progeny. In the qualifications phase, the attorney should show her expert can do all this. He should then proceed during his testimony-in-chief to do all the attorney set forth.

In *Kumho Tire Co., Ltd. v. Carmichael*, 526 US —, 143 L.Ed.2d 238, 119 S.Ct. 1167 (1999), reversing *Carmichael v. Samyang Tire, Inc.*, 131 Fed.3d 1433, the U.S. Supreme Court states at page 1177:

As we said before...the question before the trial court was specific, not general. The trial court had to decide whether this particular expert had sufficient specialized knowledge to assist the jurors in deciding the particular issues in the case.

After the expert sufficiently meets the five ways for generally qualifying in his discipline, the trial judge must be satisfied he also qualifies in the spe-

cific expert fact in issue to be addressed.

2. An Example of Specificity

First, the expert fact in issue that is to be addressed must be clearly defined. It is one thing to show a handwriting expert can identify ordinary signatures, but it is quite another thing to be able to identify, for example, the signature of a patient with Alzheimer's. The ability to write will change as the illness advances until the signature can only be written in slavish imitation of a model the Alzheimer's patient is told to copy. Eventually the ability to write disappears. To testify to such signatures, one must show familiarity with the relevant research and be able to explain clearly the graphic dynamics through the various stages of their deterioration due to Alzheimer's.

In *29 Journal of Forensic Sciences*, "Alzheimer's Disease and Its Effect On Handwriting," 8791 (Jan. 1984), James E. Behrendt states at page 89:

As the disease progresses all patients eventually lose the ability to write...Just before complete loss of writing ability an Alzheimer's patient will reach a condition where he or she will be unable to write or sign their name on command. If the name is placed before the patient, however, the patient will proceed to write.

3. Demonstrating Specificity

Second, the expert should survey his entire background for data directly related to the specific expert fact in issue. These then tell the attorney what questions to ask in qualifying the expert witness. To show one knows how to do what needs to be done, testimony as to previous case experience re Alzheimer's, attendance at seminars teaching the matter, papers published, and presentations given on the topic should carry the burden of proof, provided it is all true.

4. Being Prepared

Even before being engaged to perform specialized work, the expert should fill in lacunae in the fives ways of Rule 702. The prudent expert will actively pursue new knowledge and skill in his field so that there is less chance that a new commission will find him perplexed.

5. Not Overstepping Oneself

However, even the most knowledgeable expert cannot honestly meet the requirements for all issues that might arise. Ethics require that one refer any work that is beyond one's competence to a well qualified colleague.

6. Case Illustrations

Two cases about admissibility of expert testimony as to writer of graffiti illustrate how specificity in laying a foundation can make all the difference.

In *Bryn, et al., v. Bryn*, 2004 Conn. Super. LEXIS 2676 (Conn. Super. Ct. 2004); 2005 Conn. Super. LEXIS 2713; affirmed, 944 A.2d 442 (Conn. App. 22, 2008). At page [*8] of 2005 Conn. Super. LEXIS 2713, we read:

> **Peggy Kahn, the handwriting expert, confirmed that [Defendant] Roger was the author of the graffiti at the Old Greenwich railroad station. She clearly pointed out several identifying characteristics in the graffiti which she identified as consistent with the defendant's writing style.**

To the contrary, in *People v. Michallon*, 201 A.D.2 915, 607 NYS2 781 (NY Supreme Ct 1994), the expert should not have been permitted to testify. In 607 NYS2 781, at page 783, the Court of Appeals says:

> **[T]he court erred in admitting opinion testimony by the People's handwriting expert that spray paint writing on the victims' vehicles corresponded to defendant's handwriting. The People failed to make the threshold showing that comparing handwriting to spray paint writing is scientifically reliable.**

The expert failed to be familiar with published research showing how such comparison can be reliable if done correctly. It is charity that the case report does not name the expert.

III. RELEVANCE

A. The Applicable Rules

Federal Rule of Evidence 401 states:

> **Definition of "Relevant Evidence": "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.**

Rule 403 states when the relevant may not be admissible:

> **Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.**

B. Mostly the Lawyer's Job

I believe the attorney is primarily responsible to be sure her expert witness satisfies all that is needed to fit comfortably under Rule 401's definition of "relevant" as well as not being tainted with anything resembling any of Rule 403's grounds for exclusion. However, experience taught me long ago that the attorney is so overly burdened with all the minutiae and onera of litigation that full faith in her expert witnesses is a necessity for psychological survival. Therefor, I firmly believe the expert must master these things as a matter of course, bringing to the attorney's attention what is beyond the capacity or authority of the expert. We serve others best by lessening their burdens as much as possible.

C. How the Examiner Can Contribute to Satisfying the Rules

1. First Things First

The expert must understand what are the exact fact(s) he is asked to prove. This harkens back to Section II, Subsection B, Paragraph 2: "First, the expert fact in issue that is to be addressed must be clearly defined."

2. Unfair Prejudice

To give one example, the expert must understand how exemplar documents or demonstrative evidence can unfairly prejudice the opposing party. Among other causes of unfair prejudice is violation of a party's legal or constitutional privilege. Sometimes the unfair prejudice will make the expert testimony inadmissible, while at other times the expert is saved by an alternative expedient.

Alexander v. State, 759 So. 2d 411 (MS 2000), illustrates how an initial violation of the spousal privilege is avoided in the final testimony. Appellant was convicted of capital murder and sentenced to life without parole. Among other asserted errors, appellant argued that the State's handwriting expert, A. Frank Hicks, had improperly used as exemplars some letters that Alexander wrote to his wife.

However, the Supreme Court of Mississippi states in its ruling, 2000 Miss. LEXIS 104, starting at [*23]:

> **P34. While the admission of any information contained in Alexander's letters [*24] to his wife would have posed a privileged communication problem, the expert's mere reliance on the letters for handwriting purposes poses no such evidentiary bar. In the latter instance, the expert is not concerned with the actual information contained in the letters; rather, he is concerned with the manner in which the letters and words are formed—the actual handwriting. The content of the privileged letters was not introduced into evidence; and therefore, there was no violation of M.R.E. 504(b). Though unnecessary, the essence of the problem was avoided when the handwriting expert altered his testimony to express opinions unrelated to the documents in question. Today's ruling is consistent with other jurisdictions. [Citations omitted.]**

3. Confusion of Issues

The expert must focus his work product precisely on the facts he was asked to prove. This is

the safest way to assure there is no wandering into forbidden pastures.

Application of this rule is well illustrated in *State v. Smark*, 1999 Ohio App. LEXIS 2989 (OH Ct App. 1999). Defendant appealed Trial Court's ruling that her handwriting expert, Vickie Willard, could not testify before the jury that Defendant did not sign the false signature to a prescription form. Since the charge was knowing possession and uttering of a false prescription, not the forging of it, Willard's testimony would confuse the jury as to what was charged and the dangers outweighed the probative value.

4. Misleading the Jury

In *U.S. v. Solano-Rodriguez*, 173 F.3d 865 (10 Cir. 1999), defendant's proffered linguistics expert, Dr. Daniel Villa, was not allowed to testify that a border patrol agent could not conduct a basic conversation with defendant in Spanish and that the defendant could not converse with the agent in English. The agent testified to having no difficulty conversing with defendant in English and that his suspicions were aroused, leading to search of her car and discovery of marijuana. Among other concerns was the likelihood of the expert linguistic evidence misleading the jury.

5. Undue Delay, Waste of Time

Reports, testimony, and other expert evidence should be as pithy as the problem permits and emphasize the unique contribution the expert is making. This will anticipate assertions of undue delay or waste of time. However, *Fitzgerald v. Stanley Roberts, Inc.*, 186 N.J. 286, 895 A.2d 405 (NJ 2006), shows that at times it is beyond the expert's best efforts.

Defendants sought to admit the testimony of John Paul Osborn, a handwriting expert, who would have testified that Leman Lane's signatures on plaintiff's insurance forms were probably forged. This testimony was excluded on the ground that it would take an excessive amount of time and result in a "little forgery trial within the sexual discrimination trial."

6. Cumulative Evidence

Denial of a new trial was affirmed in *U.S. v. King*, 49 Fed. Appx. 111 (9 Cir 2002). King contended that the opinion of a handwriting expert given after trial constituted newly discovered evidence warranting a new trial. At best, the new opinion was cumulative of other evidence given at trial, and so it did not constitute new evidence.

IV. RELIABILITY: WHAT *DAUBERT* SAYS, NOT WHAT SOME SAY IT SAYS

A. The Good Intention: A More Liberal Policy of Admitting Expert Evidence

The *Daubert* decision was meant to make it easier to present expert evidence at trial by allowing more than one gate to admissibility. *U.S. v. Crisp*, 324 Fed.3d 261 (4 Cir 2003); cert. denied, *Crisp v. U.S.*, 157 L.Ed.2d 159, 121 S.Ct. 220 (US 2003), brings this out nicely. Both fingerprint and handwriting identification evidence were challenged on appeal on basis of abuse of discretion in admitting them, asserting neither met *Daubert* factors other than general acceptance. While in jail, Crisp tried to pass a note to an accomplice saying what story he should give about the robbery. Thomas Currin, handwriting expert, identified Crisp as writer of the note. In 324 Fed.3d 261, at page 268 the Fourth Circuit Court of Appeals states:

> **The *Daubert* decision, in adding four new factors to the traditional "general acceptance" standard for expert testimony, effectively opened the courts to a broader range of opinion evidence than was previously admissible. Although *Daubert* attempted to ensure that courts screen out "junk science," it also enabled the courts to entertain new and less conventional forms of expertise.**

So much for what *Daubert* actually provided. Certain critics of forensic expertise fabricated the theory that every proffer of expert evidence had to satisfy all *Daubert* factors. Additionally, they ignored the repeated assertion by the U.S. Supreme Court that the *Daubert* factors were guidelines and that an alternative set of criteria could be used in

a particular case if shown to be reasonable. In repeating their theory in face of all reality, the critics managed to have it generally accepted, thus creating weapons for excluding an opponent's valid and reliable expert evidence, and thus negating the intent to provide more liberal ways to enrich trials with cutting-edge developments in science and technology.

B. Reliability: How Reliable Is the Definition?

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786 (1993), the syllabus at page 475 summarizes the process for determining reliability of proffered expert evidence:

> **Many considerations will bear on the inquiry, including whether the theory or technique in question can be (and has been) tested, whether it has been subjected to peer review and publication, its known or potential error rate and the existence and maintenance of standards controlling its operation, and whether it has attracted widespread acceptance within a relevant scientific community. The inquiry is a flexible one, and its focus must be solely on principles and methodology, not on the conclusions that they generate.**

1. Do We Have a Definition?

But what precisely is "legal reliability?" Neither *Daubert* nor its clarification in *Kumho* offers us a reliable definition of "legal reliability." You might wish to skip the catalog of non-clarifying clarifications given in Item 2 below, and simply accept its being equated to two other terms, neither of which helps.

First, it is said to equate to "scientific validity." However, although all expert testimony must be shown to be reliable, only the kind based specifically on scientific principles need show scientific validity. Therefore, legal reliability cannot equate to scientific validity, since the scope of the former is much broader.

Second, the Court said legal reliability equates to trustworthiness. However, "trustworthiness" is never defined. Every trial judge can comfortably settle into a personal definition of "trustworthiness," and the courts of appeal can have theirs, and all the while everyone can pretend we all use the same definition. Courts at any level may then without abuse of discretion justify any ruling on admissibility based on any of the multiple, amorphous definitions one can possibly give to "trustworthiness."

2. A Catalog of Non-clarifying Clarifications

The Summary in *Daubert* at page 460 states that, in a federal case involving scientific evidence, evidentiary reliability is based on scientific validity. Arguably most expert evidence does not involve scientific evidence. So might we infer something the Court never says, that evidentiary reliability is based on a demonstrated and pertinent validity of some unspecified sort? Headnote 3 states:

> **Rule 702's requirement that an expert's scientific testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability, that is, trustworthiness.**

However, expert testimony need not be scientific nor have a scientific predicate. This is just one aspect of reliability that was not sorted out rationally by the Court. Rationality requires a definition of legal reliability that would apply equally to all types of expert testimony. Additionally, "trustworthiness" is never defined within this context. At page 481 we read:

> **Proposed testimony must be supported by appropriate validation, i.e., "good grounds," based on what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.**

Later the science is inferred not to be a universal requirement since all expert testimony, scientific, technical and specialized, must be equally shown to be legally reliable, and thus expert testimony is not limited to scientific knowledge.

Also at page 481, footnote 9 states:

We note that scientists typically distinguish between "validity" (does the principle support what it purports to show?) and "reliability" (does application of the principle produce consistent results?)...[O]ur reference here is to *evidentiary* reliability—that is, trustworthiness.... In a case involving scientific evidence, *evidentiary reliability* will be based upon *scientific validity*. [Emphases in original.]

Unfortunately, this definition of scientific reliability means that an incorrect application of a scientific principle that consistently gives the same incorrect result is reliable. But then there are experts, I suppose, who can be relied on to give unreliable opinions and do so consistently. America's Fred Zain comes to mind. Prosecutors found him very reliable when competent experts said the evidence simply did not prove defendant guilty. He gave prosecutors the evidence they needed to win when the truth was an encumbrance to conviction.

At page 485 the *Daubert* Court states:

To summarize: "General acceptance" is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence–especially Rule 702–do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.

Now turning to *Kumho Tire Co., Ltd. v. Carmichael*, 526 US —, 143 L.Ed.2d 238, 119 S.Ct. 1167 (1999), reversing *Carmichael v. Samyang Tire, Inc.*, 131 Fed.3d 1433, we fare no better in our quest for a reliable definition of "legal reliability" *Kumho* clarified *Daubert*, but unfortunately in this matter it did so with the same lack of clarification. In *Kumho* the Supreme Court states at page 1169:

The *Daubert* "gate keeping" obligation applies not only to "scientific" testimony, but to all expert testimony. Rule 702 does not distinguish between "scientific" knowledge and "technical" or "other specialized" knowledge, but makes clear that any such knowledge might become the subject of expert testimony. It is the Rule's word "knowledge," not the words (like "scientific") that modify that word, that establishes a standard of evidentiary reliability.

So we can ignore all the previous clarifications of "evidentiary reliability" that referred to scientific criteria, and still be at a complete loss since there is no guidance to distinguish between the kind of knowledge that qualifies as expert versus any other kind of knowledge.

Immediately after the above passage, the Court adds experience to knowledge as a basis for showing reliability. If either will do, might a well-experienced ignorant person pass muster?

Then at page 1170 we are told:

In determining whether particular expert testimony is reliable, the trial court should consider the specific *Daubert* factors where they are reasonable measures of reliability.

Are we now told these factors might just as well be on occasion unreasonable measures of reliability? There is no guidance as to how one is to distinguish between occasions of their reasonableness versus their unreasonableness. All the gifts we thought were securely under our litigational Christmas tree have been nullified on some unspecified occasions.

All in all, *Kumho* uses 90 instances of various forms of the word "reliable," yet there is no assurance any use is reliable, since the Court gives no clear, precise definition of what it means as a legal term. Saying it equates to "trustworthiness" is useful only if "trustworthiness" is given a precise and clear definition. And equating it with "scientific validity" is of no help since nonscientific expert testimony must be as trustworthy as scientific expert testimony, yet it concededly does not need to have any scientific basis.

Given such a lovely muddle, legal scholars and courts of law speak as if they all know precisely what "reliability" and its related terms mean. How-

ever, no one asks for a clear clarification, merely accepting the unclear clarifications. It is a legal application of the principle abandoned by the U.S. Armed Forces: Don't ask, don't tell!

The wonder is that the practical guidelines that the Federal Rules of Evidence provide in the wake of *Daubert* and its progeny can assure that expert evidence is reliable, whatever definition one uses or fails to use.

C. Tested: Meaning "Falsifiability, or Refutability, or Testability," Come Again?

Chief Justice Rehnquist, with whom Justice Stevens joined, concurring in part and dissenting in part, stated at page 487 of *Daubert*:

> **The Court then states that a "key question" to be answered in deciding whether something is scientific knowledge "will be whether it can be (and has been) tested" *Ante*, at 593, 125 LEd .2d, at 482-483. Following this sentence are three quotations from treatises, which not only speak of empirical testing, but one of which states that the "criterion of the scientific status of a theory is its falsifiability, or refutability, or testability." *Ibid.***

I defer to no one in my confidence in federal judges; but I am at a loss to know what is meant when it is said that the scientific status of a theory depends on its "falsifiability," and I suspect some of them will be, too.

Not a single one of the *Daubert* criteria is "falsifiable." Nor refutable, nor testable. So whatever these terms might mean, they mean that the criteria for legal reliability are unreliable. If one considers them as criteria for establishing the scientific status of any principle or method in science, then science is essentially unscientific. Yet they can get the job done to everyone's satisfaction. We just all must agree to let science do with a judicious bit of the irrational and illogical, which will nicely humanize it. Additionally, although many scientists take themselves terribly seriously, the rest of us can take them a bit lightly.

D. Peer Review and/or Publication

This factor especially teaches us how all criteria can be manipulated to persuade the trial judge to include our evidence and/or exclude opposing evidence according to our particular bias.

1. Peer Review: A Cautionary Tale

293 Science, "Peer Review and Quality: A Dubious Connection" 2187-8 (Sept. 21, 2001), reports a preliminary research enquiry into scientific medical journals with peer review for acceptance of papers for publication versus those with editorial review only. At a scientific meeting, two researchers presented a preliminary survey on this issue. Results showed that papers with enduring scientific value came equally from peer-reviewed and editor-reviewed publications. They proposed that editors cooperate for a properly designed, large scale research. Editors of editor-reviewed publications accepted the proposal, while those of peer-reviewed publications said no. They would continue with what they had always done, there being no need to learn whether there was objective value in it.

Then came the report in *309 Science*, "Suggesting or Excluding Reviewers Can Help Get Your Paper Published," 1974 (Sept. 23, 2005). Authors of papers complained their papers were rejected for publication in peer-reviewed journals. Solution? They demanded, and were granted, the right to know who the peer reviewers were, to veto one or more of them, and to have their own selections for peer reviewers placed on the journal's panel. Would you be surprised that this peer review of one's peer reviewers significantly improved one's chances of being published?

2. And/or

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786 (1993), stated at page 477:

> **The [Ninth Circuit Court of Appeals] emphasized that other Courts of Appeals considering the risks of Bendectin had refused to admit**

reanalyses of epidemiological studies that had been neither published nor subjected to peer review. 951 F2d, at 1130-1131.

This clearly shows that peer review does not equate to its subset, publication. Nevertheless, the myth has arisen that one need only consider peer-reviewed publications.

Board of Forensic Document Examiners has this as part of what is considered for recertification as stated at their web site, http://www.bfde.org/recertification.html:

Professional contributions [sic] are given for donating time for the good of the profession. Activities include such things as: serving as an officer in a professional association, chairing a symposium, participating on committees, working on a professional journal, *publishing in a peer-reviewed journal*, presenting research or technical papers at conferences. [Emphasis added.]

Presumably, however fine the paper or prestigious the journal, if it is not peer-reviewed it will not count.

3. Publication

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786 (1993), explains at page 483:

Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication. Publication (which is but one element of peer review) is not a sine qua non of admissibility; it does not necessarily correlate with reliability...The fact of publication (or lack thereof) in a peer reviewed journal thus will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised.

Clearly, if publication in a peer-reviewed journal, or the lack thereof, is not dispositive, it is at least unreasonable, if not irrational, to make peer-reviewed publication a forensic idol before which one makes dispositive immolations of experts having "the lack thereof."

An example of how an entire expertise can be rejected by a dearth of publications is *U.S. v. Van Wyk*, 83 FS2 515 (D. NJ 2000); 2001 U.S. App. LEXIS 6290 (3 Cir 2001); certiorari denied, 534 U.S. 826, 122 S. Ct. 66, 151 L. Ed. 2d 33 (US 2001). In 83 FS2 515, at page 521, it is described how Gerald McMenamin's first book was cited by the government to support reliability, but the trial court gives this assessment:

Due, however, to the dearth of published cases or journals addressing forensic statistics, the novelty of this field, and the fact that it has only been approved by law enforcement, the Court has no way of determining whether the McMenamin article is merely self-legitimized.

Since then others, such as Dr. Carole Chaski of Georgetown, DE, have authored published research reports. See, for example, *Classification Society of North America Proceedings*, "Discriminant Function Analysis in Forensic Authorship Attribution" (June 2005). In describing the scope of the paper, the author says on the first page: "Section 4 presents the results of several experiments using cross-validation within discriminant function analysis of punctuation and syntactic feature sets, illustrating that the currently optimal method has an overall accuracy rate of 95%."

Dr. Chaski has provided an overview of the forensic linguistic literature in its variety with a bibliography of 33 publications in "Author Identification in the Forensic Setting." This paper is a chapter in *Oxford Handbook of Forensic Linguistics*, Lawrence M. Solan and Peter M. Tiersma editors, New York: Oxford University Press, 2012.

4. Learned Treatises

Federal Rule of Evidence 803 provides:

Hearsay Exceptions; Availability of Declarant Immaterial. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

This passage should steer anyone clear of the misconception that only peer-reviewed publications matter. At least pamphlets have not yet been subjected to peer review. Therefore, the expert must have familiarity with both those authors and writings he relied on and those generally esteemed by a segment of his profession. All can be fair grist for the mill in which one is ground during cross-examination.

E. Rate of Error

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786 (1993), states at page 483:

Additionally, in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error, see, e.g., *United States v. Smith*, 869 F2d 348, 353-354 (CA7 1989) (surveying studies of the error rate of spectrographic voice identification technique), and the existence and maintenance of standards controlling the technique's operation, see *United States v. Williams*, 583 F2d 1194, 1198 (CA2 1978) (noting professional organization's standard governing spectrographic analysis), cert denied, 439 US 1117, 59 L Ed 2d 77, 99 S Ct 1025 (1979).

An example of how one can run afoul of this factor is shown in *Williams v. State*, 936 S.W.2d 399 (Ct App. Tex. 1997). At page 402, the expert could not name the precise literature supporting her work, and as to rate of error she said that the instrument will work or it won't, but as long it is calibrated "there's not really that much error." (Let's hear it for scientific precision!) No evidence was offered as to statistical variability, nor to learned treatises containing the method, nor to a known rate of error, nor to relevant peer review.

Forensic handwriting expertise has long had something I consider far better than a rate-of-error study. Beginning with Albert S. Osborn, authors in the field have published sources of error in handwriting identification. It does scant good to know a forensic discipline enjoys an admirable array of research reports showing very low rates of error. What will be of benefit is a tool to find out whether *this* expert may have made an error. These various lists of sources of error in handwriting identification are ideal for such an enquiry. Neglect of only one such source of error might impeach an opposing expert. For the conscientious examiner, these lists can provide a thorough means of reliability testing of one's own opinion before issuing it.

Nevertheless, forensic handwriting examination has enjoyed excellent research reports on rate of error, and not just recently. Most of these studies were designed to find out something else, such as whether the product of photocopy machines could be relied on for accurate observations and, if so, what their limitations might be. By and large the reports generally stated that participating handwriting experts achieved accuracy of observations above 90% in the most difficult situation they face professionally.

For example, Greg A. Dawson and Brian S. Lindblom report research in reliability of photocopies for determining features of line quality in signatures, *38 Science and Justice*, "An Evaluation of Line Quality in Photocopied Signatures," 189-94 (1998). A group of handwriting experts from Canada, America, Australia and United Kingdom had a cumulative error rate below 5% in reporting features of line quality in original ink signatures by examining photocopies, arguably the most difficult observation to make. The authors did not intend to make a rate-of-error study, but they made an excellent one.

Individuals who successfully participate in com-

petency testing programs are considered to have demonstrated their own low rate of error.

F. Standards of Performance, a Subset of Rate of Error

Professional organizations can establish voluntary standards for a discipline. The now defunct Subcommittee E30.02 for questioned documents of American Society for Testing and Materials International (ASTM) set such voluntary standards in questioned document examination. An examiner who does not follow these standards had better have a very compelling explanation why not. The standards provide the attorney with excellent materials to test the credibility of her own expert and a thorough means for cross-examining the opposing expert.

Another important set of standards are codes of ethics. Every professional organization has some kind of code of ethics. Typically these set forth not only guidelines for conduct of business and professional relations but also performance of work. National Association of Document Examiners has its code of ethics readily available for anyone to download at http://www.documentexaminers.org/ethics.shtml. When asked for opinions on the professionalism and competence of opposing examiners, members have testified that this code of ethics makes it unethical for them to offer such opinions. They are restricted to technical replies to opposing opinions and the reasons for such opinions. In this way all professional standards, not just codes of ethics, can protect experts from requests to perform improper services.

G. General Acceptance

Prior to 1993, general acceptance was virtually the universal standard for admission of expert evidence in American courts. It was all so simple and straightforward. When in its *Daubert* decision the U.S. Supreme Court stated that the Federal Rules of Evidence had set reliability as the standard of admission, things became quite other than simple and straightforward. From being of one mind on this issue, America's Goddess Justice developed a split personality with further fragmentation in her *Daubert* persona.

The seventy-year solo reign of general acceptance began with *Frye v. United States*, 54 App. DC 46, 293 Fed. 1013, 34 A.L.R. 145 (Ct. App DC 1923). The Federal Court of Appeals for the District of Columbia ruled that evidence of deception or honesty in statements as measured by systolic blood pressure had not gained general acceptance among physiologists and psychologists and so was inadmissible. This case report provides no citations to earlier cases establishing the rule of general acceptance, which thus is referred to as the "*Frye* rule" or "*Frye* test." However, it has been cited innumerable times by both federal and state courts as authority.

Some states, such as California, still adhere to the *Frye* rule, though most states have adopted rules of evidence based on the Federal Rules of Evidence and have for the most part adopted *Daubert* as their ruling authority.

For states still following *Frye*, once a technique or scientific principle has passed muster with the general acceptance test, it is generally considered free from further challenge. Thus, the test is reserved for novel scientific or technical evidence that has not yet found admittance as having been proven to be generally accepted in its particular field. However, an individual expert can still be challenged on his application of the relevant theory or method.

The *Frye* test is not abandoned under the Federal Rules of Evidence; it just has to share equal honors with four other ways by which expert evidence can be proven reliable. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786 (1993), states at page 483:

> **Finally, "general acceptance" can yet have a bearing on the inquiry. A "reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community." *United States v. Downing*, 753 F2d, at 1238. See also 3 *Weinstein, & Berger* ¶**

702[03], pp 702-41 to 702-42. Widespread acceptance can be an important factor in ruling particular evidence admissible, and "a known technique which has been able to attract only minimal support within the community," *Downing*, 753 F2d, at 1238, may properly be viewed with skepticism.

1. General Acceptance Does Not Have to Be Too General

In *People v. William Michael Leahy*, 8 Cal. 4th 587; 882 P.2d 321; 34 Cal. Rptr. 2d 663 (1994 CA), the Supreme Court of California reiterated its adherence to the *Frye* standard of general acceptance for admission of novel scientific evidence. It stated the nature of general acceptance this way:

First, we should make clear that "general acceptance" does not require unanimity, a consensus of opinion, or even majority support by the scientific community.

It did not make particularly clear at what point acceptance becomes general.

2. The General Views on General Acceptance: Generally Incorrect

All the other *Daubert* criteria were established only by general acceptance, which is now the ugly duckling of the clutch, but without promise of becoming a recognized swan. To my knowledge, there was no pre-*Daubert* scientific research proving their reliability as criteria of reliability to support their adoption as such. As we saw above, peer review was never tested, much less peer-reviewed, only generally accepted by peer reviewers.

V. RULES RESTRICTING EVIDENCE

A. The Applicable Rule

See subsection A of Section III, Rule 403.

B. Underlying Data

Federal Rule of Evidence 703 states:

Bases of Opinion Testimony by Experts. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

The case *U.S. v. Lewis*, 220 F. Supp. 2d 548 (S.D. WV 2002); affirmed, 75 Fed. Appx. 164 (4 Cir 2003), shows that the expert witness must be knowledgeable of sources if his reliance on them is to be reasonable. In 220 F. Supp. 2d 548, at page 554, the court explains:

In sum, Mr. Cawley could not testify about the substance of the studies he cited. He did not know the relevant methodologies or the error rate involved in these studies. His bald assertion that the "basic principle of handwriting identification has been proven time and time again through research in [his] field," without more specific substance, is inadequate to demonstrate testability and error rate.

It also helps to have actually used what was supposedly relied on. Thus, *Green v. State*, 55 S.W.3d 633 (Ct Ap Tyler TX 2001), offers several criticisms of the witness in "false confession expertise." Of interest here is that there was no indication that psychologist Thomas Allen had relied upon or utilized the research or techniques of the authors he had described.

In contrast to these two cases is *Farmers State Bank of Northern Missouri v. Huffaker*, 2009 Mo. App. LEXIS 442 (MO App. 2009). A Mrs. Huffaker claimed three areas of unreasonable reliance by handwriting expert Storer:

- There was no evidence that the material he relied on was the type of material that is reasonably relied on by experts in his field;
- There was no evidence to establish that the ex-

emplars used by Storer contained Huffaker's signature; and

• Storer impermissibly relied on a lay witness's opinion as to handwriting.

The Court of Appeals said all objections had been satisfied, and so he was properly permitted to testify.

C. Examiner's Role in Satisfying Each Provision Individually

See Section III, Subjection C, where this was discussed and illustrated.

VI. EXPERT'S REPORT: THE RULE FOR CIVIL CASES.

A. The Applicable Rule: United States Code, Title 28a, Rule 26

(2) Disclosure of Expert Testimony.

(A) In General. In addition to the disclosures required by Rule 26 (a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the data or other information considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous ten years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

The appendix to this article gives a model outline for a report with provision for all the required elements.

B. Satisfying Each Requirement of Rule 26

Every expert witness should have proper, updated documents on qualifications in his computer files and a form/sample report with all required divisions. Generally the expert would want to use the same format each time, adjusting it for special situations.

1. A Complete Statement of All Opinions the Witness Will Express and the Basis and Reasons for Them

If there is no reliable basis for an expert opinion, it is itself unreliable. Thus in *Scott Doe v. Kohn, et al.*, (Fed Dist Ct Philadelphia 1993), for lack of any technical basis defense expert Gus Lesnevich was barred from testifying that a tear in paper indicated erasure with overwriting. In the same case he was barred from identifying the person making scratch-outs over a signature. Case law requires similar scratch-outs by the person for comparison, while he used the underlying signature which was a different thing from scratch-outs so that the two could not be compared for purposes of identification. If the expert witness has a reliable theoretical basis that meets both technical and legal requirements but does not state it, the effect is the same as not having one, so that upon proper motion by the opposing party the expert's testimony can be barred.

2. The Data or Other Information Considered by the Witness in Forming the Expert Opinions

Not only must one give the data upon which the

opinion is based, but it must not be inaccurately interpreted as Professor Michael J. Saks did in *U.S. v. Hidalgo*, 229 FS2 961 (D.C. AZ 2002). At page 965, the judge discusses Saks's interpretation of research studies by Professor Moshe Kam:

> **[Saks] claims that while most non-professionals performed poorly, a few performed as well as professionals. He contends that this shows that those nonprofessionals were motivated while others were not, and that motivation positively correlates with outcome. We do not agree. The worst professional made two errors. The best non-professionals made about nine errors, while the worst nonprofessional made about forty-four errors. Even the worst professionals clearly outperformed the best non-professionals.**

Because of this lack of reliable data for Saks's opinion, among other reasons, the defense motion to have ruled inadmissible the government's handwriting expert, William J. Flynn, was denied. However, due to failure of the government to present sound data of its own, Flynn was not permitted to express an opinion as to genuineness or falsity, but only to present his expert observations to the jury.

3. Any Exhibits That Will Be Used to Summarize or Support the Expert Opinions.

In a federal district court civil case where I was plaintiff's expert, the defense counsel declined to depose me or request my reports. However, one morning, less than a week before trial, they rightly requested statement of all opinions I would testify to with anticipated trial exhibits. I suggested the law office simply send to them my reports that contained it all. That afternoon they offered a settlement. This is the result hoped for in the federal rules about reports and disclosure.

4. The Witness's Qualifications, Including a List of All Publications Authored in the Previous 10 Years

For this I simply maintain a complete list of all professional publications from the very first. If an expert witness has written and published something impeachable, then one can only hope and pray that ten years come much sooner than that. The remedy is to write and publish wisely.

5. A List of All Other Cases in Which, During the Previous Four Years, the Witness Testified as an Expert at Trial or by Deposition

The attorney advisedly would subscribe to a service that maintains a record of testimonies by experts. One individual was roundly criticized by a judge for participating in an ink expert's spoliation of an original document in the court files without obtaining the court's permission or notifying the opposing party. Though he had testified, the expert did not include the case in his list of testimonies and was never caught on the omission until the four-year limitation had passed. A judicious bit of research by opposing attorneys before cross-examining him would have eventually uncovered the omission.

6. A Statement of the Compensation to Be Paid for the Study and Testimony in the Case

This is best satisfied by including, as an exhibit to the report, a copy of the expert's current fee schedule, and stating the amounts already invoiced to the client along with estimated time for future work.

C. Examples of Special Situations

There are situations where the rules require particular features in an expert's report in the form of an affidavit or declaration under penalty of perjury. When an affidavit is required in federal district court, or a state trial court following Federal Rules, the affiant must be sworn before a notary public who signs, then stamps or seals the jurat. There is a particular wording required.

The following are offered as illustrative of the many special situations and their particular rules.

1. Affidavit in Support of, or in Opposition to, Motion for Summary Judgment

Federal Rules of Civil Procedure provide in Rule 56, Summary Judgment, as follows:

> **(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion...**
>
> **(c) Procedures...**
>
> **(4) Affidavits or Declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.**

A state court case in point is *In the Matter of the Last Will and Testament of Ernest W. Smith, Deceased: Smith v. Smith*, 910 So. 2d 562 (MS 2005). In an effort to set aside a deed, a report by handwriting expert Richard Orsini was filed two years after the motion for summary judgment, but an affidavit was never obtained from him. Summary judgment was properly granted, and Orsini's report was correctly not considered. Knowing Mr. Orsini to be competent and conscientious, I assumed he had never been informed as to the use that would be made of his report nor properly instructed on its format. He confirmed to me that such was the case.

2. Back-up to Another Expert

An attorney might have a nagging feeling that her expert's evidence is less than weighty, so the supporting affidavit of another expert is offered. This, however, must be relevant and more than mere bolstering. If the first expert's affidavit or testimony fails acceptance, the second would likewise fail as not relevant to an issue in fact or law. This is nicely illustrated in *Dracz v. American General Life Insurance Co.*, 426 F.Supp.2d 1373 (M.D. GA 2006).

The handwriting fact in issue was whether the "Yes" or "No" answer box for a question on an insurance application form had been checked first and who marked the other if not plaintiff. Plaintiff called Curtis Baggett "who examined a copy of Dracz's insurance application and reached an opinion regarding the author and the sequencing of the marks in Question 5's check boxes." Upon defendant's motion in limine Baggett was ruled not qualified to testify. Further, even if he had been found qualified, his method was unreliable, and so he would still have been inadmissible. Don Lehew, a colleague of Baggett's, submitted an affidavit, the sole purpose of which was merely to bolster Baggett's credentials and report. Since Baggett was disqualified, defendant's motion to strike Lehew's affidavit was moot.

3. Grand Jury

One must watch for particular situations that occur rarely or for rules that might vary from one jurisdiction to another and from time to time. The case *In re Grand Jury Proceedings (Schofield)*, 486 F.2d 85 (3 Cir 1973), referred to as *Schofield I*, gives rules for at least the district courts under the federal Third Circuit Court of Appeals, for at least that time period. The government must make a preliminary showing in affidavit on handwriting exemplars to be taken for use in a grand jury hearing. The affidavit must state that the exemplars are relevant to the grand jury's inquiry, properly within the grand jury's jurisdiction, and not sought primarily for another purpose. The affidavit should be disclosed to the witness who will have to give the exemplars. If an exemplar proves not relevant to the grand jury's inquiry, the witness may request the same be destroyed or returned.

D. Testimony Limited to What Is in the Report

This is illustrated by *Malachinski v. Commissioner of Internal Revenue*, 268 Fed.3d 497 (7 Cir 2001). We read at page 501 that Malachinski's expert, Diana Marsh, "as a board-certified forensic document examiner," failed to include in her

report "the facts, data, and analysis that form the basis for an expert's conclusion," and so she was properly not permitted to testify to them.

An expert must be assiduous in finding out the requirements of the rules for expert note-taking, reports, testimony and other aspects of the work. One cannot rely on the attorney/client to provide all such information. The discounting of the expert's opinion for some neglected technicality can come back to haunt the expert, not the attorney/client. See the case of *Deputy v. Lehman Brothers, Inc.*, 345 F.3d 494 (7 Cir 2003), where the *Malachinski* case came back to haunt Ms. Marsh. By including in the report all the elements discussed in this paper, an expert need not fret over this rule.

VII. CONCLUDING REMARKS

The following remarks may have other authority than my own experience, yet they are none the less deeply felt and earnestly offered.

A. Don't Come Cry on My Shoulder Afterwards

Colleagues have reported their anguish at facing a serious challenge to their qualifications or admissibility at the last moment before the hearing. At 78 years of age I have learned not to feel sorry even for myself in such situations, no matter the angst rising in the soul. The time for case-specific preparation is the moment when one is first informed of the challenge. The time to begin general preparation is the unchallenged present, as in this very moment. We have a saying in America about being up to various parts of one's anatomy in alligators, the anatomical part specified being in accordance with the speaker's level of social nicety or vulgarity. The principal question is not what to do when already so immersed, but how to avoid such immersion and where to turn for guidance when the threat of immersion is first hinted.

B. In Good Time Ask for Help or Refer the Case to a Qualified Examiner

1. Help!

The Beatles sang: "I get by with a little help from my friends." The prudent expert witness changes "a little" to "a lot" and sings loud, clear and often. When someone compliments me on the contents of my writings or presentations, I respond by saying I never had an original idea, I learned it all from what others have said or written. I only compile it in a hopefully handy and helpful format. I am always looking for help from every fruitful source, the first being the attorney by whom I am retained. Many attorneys, including friends, clients and from the opposition, have either taught me important lessons or directed me to reliable sources of instruction.

A significant portion of my professional services is to respond to other experts who ask confidential guidance on some issue. With the permission of Cina Wong, a board certified document examiner in Norfolk, VA, I use her enquiry as an example. She asked me whether the Commonwealth of Virginia's rules for admissibility of expert evidence followed *Frye* or *Daubert* so that she might prepare herself for any forthcoming challenges. I researched and found that Virginia followed her own rules that are essentially intact from colonial days. See *90 Judicature*, "Virginia's Answer to *Daubert*'s Question Behind the Question," 68-71 (Sept.-Oct. 2006), by Justice D. Arthur Kelsey, Court of Appeals of Virginia. The paper is available at http://www.ajs.org/ajs/publications/Judicature_PDFs/902/Kesley_902.pdf. I also discovered case reports wherein Ms. Wong's testimony was specifically praised and relied on by the court in rendering its decision, while she had been unaware of these.

2. Referral to Another Expert

For this I will use my own practice as an illustration. When enquiry comes to me for chemical testing of inks, for which I am not qualified, I refer the enquirer to Dr. Valery Aginsky of East Lansing, MI. If it is a matter of challenging a proposed ink testing by some other ink expert, I do not hesitate to do so myself, determining whether or not scientific and technical requirements have been met, and whether or not the expert proposes to do what published research proves impossible, unfeasible

or at least problematic. This kind of evaluation has assisted attorneys in preventing proposed ink testing that would spoliate documents, yet the ink expert had failed to demonstrate its scientific validity, much less it legal reliability.

C. Other Possible Issues in the Law

As one example of what may be applicable to expert practice but relates to a tangential issue, I offer the following quote from Federal Rule of Evidence 406:

Habit; Routine Practice:

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Handwriting experts routinely use the principle that the graphic habits provable by the exemplar writings by a suspect establish traits significant for identification. If these traits are found in questioned writings, the experts conclude they also were written by the same suspect. However, just as routinely cross-examiners fail to challenge the handwriting expert on whether or not such allegedly habitual traits meet the criteria for proving a habit. Only one expert told me that occurred in a case. The opposing expert asserted that traits appearing in less than half the available exemplars proved the writer's graphic habits. The cross-examiner had the expert agree that a habit is something one does more often than not. Thereupon it was a matter of a few select questions before every "graphic habit" the expert relied on was conceded to have occurred in a minority of instances.

D. Remember, Expert, Dust to Dust and Ashes to Ashes

Kumho Tire Co., Ltd. v. Carmichael, 526 US —, 143 L.Ed.2d 238, 119 S.Ct. 1167 (1999), reversing *Carmichael v. Samyang Tire, Inc.*, 131 Fed.3d 1433, states at page 1179:

Carlson himself claimed that his method was accurate, but, as we pointed out in *Joiner*, "nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert." 522 U.S., at 146, 118 S.Ct. 512.

For the young among us far removed from Latin phrases, "ipse dixit" means "he himself has said [it]." Thus, the Supreme Court is advising against accepting evidence merely on the say-so of the expert witness.

The case *Minnesota Mining and Manufacturing Co. v. Atterbury, et al.*, 978 S.W.2d 183 (Ct Ap TX Texarkana 1998), at page 200 gives a perfect application of this view:

[H]erndon based his opinion on his considerable experience in the field of neurology. This evidence goes to whether Herndon was qualified to give an opinion, not on whether his opinion is reliable.

Unfortunately, the prevailing rule in American courts, both federal and state, is that the expert witness's qualifications, especially experience, are considered sound bases for accepting the opinion, whatever countervailing evidence there is and however anemic of substance is the expert's alleged theory or facts underlying the opinion.

A case that came down soundly on the two opposite sides of the issue is *Gammill v. Jack Williams Chevrolet, Inc.*, 875 S.W.2d 27 (Ct App. Tex. Fort Worth 1994); summary judgment after remand affirmed, 983 S.W.2d 1 (Ct App. Tex. Fort Worth 1996); affirmed, 972 S.W.2d 713 (TX 1998). In 972 S.W.2d 713, at page 722 the Supreme Court of Texas makes a supreme self-contradiction:

On the one hand, an exception [under Rule 702] for evidence based on a witness's skill and experience would easily swallow the rule...On the other hand, there are many instances when the relevance and reliability of an expert witness's testimony *are* shown by the witness's

skill and experience. [Emphasis in original.]

The rule just got swallowed.

The only reported research on this issue that I know of is *47 Journal of Forensic Sciences*, "Forensic Handwriting Examiners' Expertise for Signature Comparison," 1117-24 (Sept. 2002), by Jodi C. Sita, et al. Testing the competence of handwriting experts over several years, the authors report that tested and proven expertise had no significant correlation with years of experience.

E. And the Critics Need Criticizing

In *Kumho Tire Co., Ltd. v. Carmichael*, 526 US —, 143 L.Ed.2d 238, 119 S.Ct. 1167 (1999), we read at page 1179:

> **Justice SCALIA, with whom Justice O'CONNOR and Justice THOMAS join, concurring.**
>
> **I join the opinion of the Court, which makes clear that the discretion it endorses—trial-court discretion in choosing the manner of testing expert reliability—is not discretion to abandon the gatekeeping function. I think it worth adding that it is not discretion to perform the function inadequately. Rather, it is discretion to choose among reasonable means of excluding expertise that is fausse and science that is junky. Though, as the Court makes clear today, the *Daubert* factors are not holy writ, in a particular case the failure to apply one or another of them may be unreasonable, and hence an abuse of discretion.**

The critics of forensic expertise have fostered the myth that the U.S. Supreme Court said the contrary of the above last sentence. They go further and claim the only scientific testing that counts is comparing forensic experts to lay persons performing the same task. They ignore the fact that it always takes a reliable expert to expose the unreliable expert and prove the truth of the matter. There are many other erroneous aspects to the prevailing belief about forensics. However, the question is so complex and the false assertions so convoluted, that another paper of greater length would be needed to expose and refute the fallacies. This can serve as a hint of how to counter a critic of forensic expertise testifying as an expert: None of them could pass muster under either their own incorrect criteria for admissibility nor under those given in the law as set forth in this paper.

APPENDIX: Outline of a Model Report

Each page of the report would have a footer, such as:

(Report of [date] from [expert's name] to [recipient's name]; Expert's File Name or Number. Re: [name of case]. Page N of NN pages.)

The following model report builds on an actual report in the case *Nazim Omara, Applicant, vs. Al Mal Bank, LLC, Respondent* and addressed to QFC Civil & Commercial Court in Doha, Qatar.

In the model report, square brackets, [ ], are used for editorial and explanatory comments that would not themselves be included in the report.

If there is a special situation, the expert must incorporate all required statements for the special situation if not already satisfied. One should put them in the most logical place, maybe even reiterating them in a special section for emphasis. One uses any special format required, asking the attorney/client if in any doubt regarding requirements. For example, a particular jurisdiction may have a special form required for the witness's sworn statement and the jurat, or the attorney may prefer a particular wording.

The model report begins on the next page.

LETTERHEAD

[In the United States, we usually place business name, address, phone, etc., at the top of the first page. However, if one is issuing the report for a case in another country, one would follow the practice in that country, placing these data at the bottom of the page if such is customary in that country.]

Date

Person to Whom Addressed
Organization/Company
Address
City, State ZIP Code

RE: *Name of Case*

My File Ref.: 000000-A

Dear Person-to-Whom-Addressed:

I am issuing this report pursuant to your request.

A. THE COMMISSION

You asked whether the purported signature of X on a certain document, a copy of which is attached hereto as **Exhibit A**, was his genuine signature (hereinafter: the questioned signature).

There were also submitted for my examination other documents which were represented to bear X's authentic signatures. [This must be a complete statement of the factual basis of relevancy, expanding as needed. The attorney must argue the legal basis if challenged. If the expert has any concern about factors excluding relevant evidence, they must be brought to the attorney's attention before writing the report and instructions should be requested.]

I have concluded that X did not sign **Exhibit A**. [This will permit addressing issues often encountered and often misunderstood, even by experts.]

B. THE DOCUMENTS EXAMINED

I relied on the following documents in making my comparative examination:

EXHIBIT A, attached hereto, is [precise description of questioned document].

EXHIBIT B, attached hereto and of N pages, is [either first of the exemplar documents or a collective exhibit of all the exemplar documents, each with precise description.]

[**EXHIBITS C** through ? if exemplar documents are listed separately.]

EXHIBIT D, attached hereto and of N pages, shows the questioned signature from **Exhibit A** and all exemplar signatures from **Exhibit B** enlarged for ease of observation. [All demonstrative exhibits attached are given separate letter identifications.]

EXHIBIT E, attached hereto and of four pages, is my current Curriculum Vitae.

EXHIBIT F, attached hereto and of six pages, is a list of my professional publications as an examiner of documents and handwriting.

EXHIBIT G, attached hereto, is a copy of my Fee Schedule reflecting the rate of compensation for all services I shall render in this case.

EXHIBIT H, attached hereto and of two pages, is a list of my testimonies as an examiner of documents and handwriting for the past four years.

C. THE OPINION

I have concluded that, based on all the available and reliable handwriting evidence, X did not write the disputed signature on **Exhibit A**. [Other pertinent opinions are also given. For the sake of simplicity only a single opinion is given in this model.]

I shall set forth the bases for this opinion, specifically the theory, method and facts that I relied on. Further, I shall state the limitations resulting from the materials available to me and explain how these limitations have been overcome.

D. BASES FOR THE OPINIONS

[Extensive passages illustrate both how to state these bases and how to address challenges to critical issues in expert handwriting identification. Relevant authorities and research reports are cited if requested or if a challenge from the opposing party is indicated.]

1. THEORETICAL BASES. Based on the writings of Ordway Hilton, particularly *Scientific Examination of Questioned Documents*, revised edition, 1982, it can be stated that in order to identify an individual as the writer of a questioned signature it must be shown that there are sufficient significant similarities between the individual's exemplar signatures and the questioned signature so as to eliminate the reasonable probability of another writer, and there should be no significant difference between the individual's exemplar signatures and the questioned signature that cannot be reasonably explained.

In order to prove a disputed or denied signature to be false, it must be shown that there are one or more significant differences between the questioned signature and the genuine signatures of the purported writer for which there is no reasonable explanation.

When relying only on a copy of the questioned document, such as must presently be done in this case for **Exhibit A**, no examiner of documents and handwriting can definitely, beyond a reasonable doubt, authenticate the signature, much less the entire document. What one can do is conclude that the available handwriting evidence supports, to either a probable or highly probable degree, the authenticity of the questioned signature. However, the examiner may be able to make a positive proof of falsity either in the signature or in the entire document, even to a definite opinion.

A definite finding of falsity can be made if there are sufficient significant differences between the questioned and exemplar signatures, which differences cannot be credited to the copying process. In the present case there are cogent significant differences, none of which can be credited to the copying process.

At times it occurs that parties, who rely on the authenticity of documents that they assert are only available in copy, understand the limitations of copies to mean no one can challenge their claims of authenticity. As I explained above, it is they who can never establish the authenticity based on forensic expertise. However, if sufficiently cogent significant differences exist, even a single one of sufficient

cogency, the falsity of the document can be established, at times definitely.

2. METHODOLOGICAL BASES. I adhered to generally accepted methods and procedures in making my comparative examination and arriving at my opinion in the case. See ASTM published standard number E2290-07a, *Standard Guide for Examination of Handwritten Items*, and related ASTM standards.

3. LIMITATIONS INVOLVED. *(a) Number and Noncontemporaneousness of Exemplar Signatures.*
The general rule of thumb in forensic examination of signatures is to have at least twelve genuine signatures for use as exemplars. **Exhibit B** provides twelve exemplars dated within a year on either side of **Exhibit A.**
(b) Availability of Copies Only.
The twelve exemplar signatures are copies save one. Thus, some evidence about handwriting is lost. However, if compelling evidence that cannot be the effect of the copying process is available, it can be relied on.

4. OBSERVATIONAL BASES. It is suggested that the reader have reference to **Exhibit D** to make it easier to follow this discussion. The following chart provides the observational bases of my opinion that X did not sign **Exhibit A.**

HANDWRITING TRAITS	SIGNATURE FROM EXHIBIT A	SIGNATURE(S) FROM EXHIBIT B	SIGNATURES IN OTHER EXHIBITS
TEMPO WORD SPACING LETTER SPACING FORM OR STYLE SIZE/RATIO SLANT BASE LINE			

[As appropriate, signatures are considered singly or in groups. Other writing traits are considered when applicable and observable, such as proportion, pressure, arrangement, and continuity.]

E. OPINIONS

[All opinions are restated succinctly.]

F. QUALIFICATIONS

[Reiterated with notations of any further specific qualifications required by the instant case, with examples given.]
Attached hereto and incorporated herein as if set forth in full, **EXHIBIT E** is a copy of my current Curriculum Vitae stating the background and experience that qualify me to undertake the examination

requested and form the opinions expressed herein. On page N, **Exhibit E** lists the presentations and classes I have given related to the examination of questioned signatures. On page N it lists the training programs and presentations I have attended in which this subject was taught.

Attached hereto and incorporated herein as if set forth in full, **EXHIBIT F** is a list of my professional publications as an examiner of documents and handwriting. Items such-and-such on **Exhibit F** concern issues related to the authentication of questioned signatures.

Attached hereto and incorporated herein as if set forth in full, **EXHIBIT G** is a copy of my Fee Schedule reflecting the rate of compensation for all services I shall render in this case.

Attached hereto and incorporated herein as if set forth in full, **EXHIBIT H** is a list of my testimonies as an examiner of documents and handwriting for the past four years. N% of my testimonies involved the authenticity or falsity of questioned signatures.

G. CONCLUSION

If called upon to do so, I would testify under oath in a legal proceeding that all the statements and representations made herein are true and accurate to the best of my knowledge and belief, and I would be prepared to demonstrate and explain the cogent reasons for the opinions expressed herein. If court testimony is required, I would prepare appropriate court exhibits by which to illustrate and explain my observations, opinions and reasons.

Sincerely,

[Signature]
[Expert's Full Name Typed]

Marcel B. Matley, CDE is a San Francisco based handwriting and document examiner. He holds an MALS degree from Immaculate Heart College, Los Angeles. His formal study in handwriting analysis was with Rose Toomey in 1979-1980, with certification by Kathi de Ste. Colombe of the Paul de Ste. Colombe Center in January 1981. That study continues to date with reading in all aspects of handwriting, including document examination literature, medical and psychological research, paleography, education, Western formal penmanship and Oriental calligraphy.

In 1985, Mr. Matley formally began work as a document examiner, which activity is now his full time profession. He is a court-qualified expert witness, has authored several published monographs and articles, and has presented at several professional conferences. He has a library collection of over 13,000 items related to forensics and handwriting. Mr. Matley is Board Certified by NADE and frequently acts as a consultant and mentor to other document examiners.

Mr. Matley and his wife Helen live in San Francisco in a 1908 Victorian which they are progressively enhancing. NADE members who visit the City are welcome to call and arrange to visit.

Marcel B. Matley, CDE
San Francisco, CA
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Some Opinions Elicited by the Israeli Courts Concerning Court-Appointed Handwriting Experts

by
Pnina Arieli

Abstract: In Israel, those who are governmentally trained are called "document examiners" and are trained in fingerprint and other chemical analyses of documents, as well as the examination of machine-generated, typewritten, or handwritten documents. Private sector-trained document examiners, who primarily deal with machine-generated, typewritten, or handwritten documents, are termed "experts in judicial graphology" or "handwriting experts" (either is acceptable).

This article presents Israeli Supreme Courts' positions regarding a few of the most pertinent issues for Israeli judicial graphologists (handwriting experts). Court citations have been translated from Hebrew into English by the author.

Issues about the range of responsibilities of judicial graphologists and document examiners have elicited opinions from the Israeli Supreme Court about:

- Whether or not handwriting experts may be court appointed;
- expert witness immunity based on testimony;
- reliability of expert testimony based on machine-generated copies/photocopies;
- the need for clarity in court-appointed expert reports;
- the weight of prior judicial opinions regarding experts; and
- cases involving a foreign language

In U.S. courts "graphology" is generally viewed with skepticism, since it is essentially a method of personality assessment often criticized for lack of scientific foundation. But in many countries outside the U.S., the terms "graphologist" or "judicial graphologist" are used interchangeably with "forensic handwriting expert" or "handwriting examiner." In Romania, there are "judiciary experts in handwriting," and in France, the term used is *"expert judiciaire en écriture et documents"* (judiciary expert in handwriting and documents). Similarly, in Greece document examiners are called "judicial graphologists." As stated in this article, Israeli handwriting experts are termed "experts in judicial graphology" or "handwriting experts."

By including this article, we acknowledge that graphology is defined differently outside America. However, we are in no way suggesting that character assessment is part of the forensic examiner's work.

—Editor

Basic Information Regarding the Israeli Courts and Judicial Graphologists

The Israeli legal system is based on the British legal system. There are no juries, nor are there depositions. Once the court receives the handwriting experts' reports, rarely do both sides agree to compromise or to cancel the prosecution. Consequently, handwriting experts regularly testify in court.

Typically, a handwriting expert represents one of the two sides in a legal dispute. However, early in a case when both sides have agreed to a mutual expert, the court may appoint a single handwriting expert or document examiner who represents neither party.

An appointment may also occur after both sides have obtained opposing opinions from their own experts. The judge then decides on the appointment of a third expert, who is considered to be neutral, since this person represents neither side. This third expert can (and should) ask to see the other two experts' opinion reports as well as examine the same documents as did the other two experts.

If a single expert was appointed by the court to represent both sides, one side may be disappointed by the opinion and would then be given the opportunity to question the expert before trial for clarification. This is done either by sending the expert written questions, or interrogating the expert on the witness stand.

The Court's Evaluation of an Expert

"מקצוע הגרפולוגיה הגיע היום לדרגת מדע שימושי ואין עוד להטיל ספק בכושרו של הגרפולוג לגלות זיופים."
ע"פ 352/71 אברהם טל נ' מדינת ישראל פ"ד כ"ו (2) 107

"The profession of graphology has reached the level of a practical science and nobody can cast doubt about the ability of a *graphologist* to reveal forgeries." *HCJ, HHJ Zusman, CrA 352/71 Avraham Tal v. State of Israel,* PD 26(2)107 (Emphasis added.)

There continue to be issues brought up by opposing council as a way of getting the non-governmental handwriting expert disqualified. The basic contention is that the handwriting expert's opinion is not equal to that of document examiners who are trained by the forensic department of the police and who are currently either employed by the government or are retired government document examiners. Although the courts acknowledge the qualification of private handwriting examiners and appoint them as experts, the government document examiners continue to unjustly claim that their knowledge, training, and experience are superior to that of the non-governmental experts.

Since there are no academic courses for the non-government people who want to practice document examination, handwriting experts come from graphological backgrounds and bring pertinent aspects of handwriting dynamics to their work.

Renna Nezos, Principal of the British Academy of Graphology, relates in her book *Judicial Graphology* that "the graphologist who studied document authentication has the advantage of knowing the mechanisms of handwriting. He knows how a stroke has been drawn and what the driving movement behind it was. This is of extreme importance in judicial graphology. A skilled forger can imitate the forms and movements and can produce a very successful product, but he can never reproduce the individual driving movements—'the brain patterns'—of the original. Such a subtle difference can only be spotted by an experienced graphologist."[1]

Document examiner Karl Aschaffenburg agrees with Nezos and states that graphologists normally consider such factors as "the genetic development of writing, the influences on writing of physical and mental illnesses, of aging, of injuries, of drugs." He further notes that any of these may be related to a document examiner's cases and that "A knowledge of all these areas could only be helpful to him."[2]

In his book *Evidential Documents,* James V. P. Conway lists standards for U.S. federal jobs for those handling analysis of documents and handwriting. Conway states that requirements for the highest federal classification level include "thorough knowledge of the history of handwriting, the development of handwriting, handwriting execution, the systems of writing employed in the United States, the principles and techniques of examining and evaluating handwriting individualities...a thorough knowledge of the volitional and non-volitional factors, for example, age, physical illness, intoxication, mental disease, deception and fraud, causing variations in handwriting..." All of these topics are studied by graphologists.[3]

In the intervening forty-two years since the *Avraham Tal v. State of Israel* case decision, most of the Israeli Courts have stood by the previous Supreme Court's 1971 opinion.

"על מקצוע הגרפולוגיה נאמר כי הגיע לדרגת מדע שימושי ולכן מותר ולעיתים קרובות אף רצוי לעשות שימוש בחוות דעתו של גרפולוג על מנת לבסס טענה בדבר אמיתותה (או אי אמיתותה) של חתימה."
ע"א 5293/90 בנק הפועלים נ' שאול רחמים פ"ד מז (3) 262,263,240:

"The profession of graphology has reached the level of a practical science; therefore, it is allowed- and often advisable to make use of the opinion of a *graphologist* in order to establish a claim about the

1 Nezos, Renna. *Judicial Graphology.* Volume 3, p. 12.

2 Aschaffenburg, Karl. "Contribution of Handwriting Analysis to the Examination of Documents," NADE Seminar, Princeton University, 4 May 1980 (as reported by Teresa A. Hurt in "The Value of Graphological Training as It Pertains to Document Examination," NADE Journal, Vol. 18 No. 2, Fall 1995).

3 Conway, James V. P. *Evidential Documents,* Springfield, MO, Charles C. Thomas, 1959, p. 214.

authenticity of a signature." HCJ, HHJ Shamgar, CA 5293/90, *Bank Hapoalim v. Shaul Rahamim,* PD 48(3) 240,262,263 (Emphasis added.)

A 1988 Israeli Supreme Court decision relates how the Israeli courts evaluate an expert:

"אין פסול עקרוני בהסתמכותו של בית המשפט על חוות דעתו של עד, אשר בדרך זו או אחרת, אם תוך עיסוק במקצועו או כחובב, או בדרך מקרית אחרת, רכש ידע כללי בנושא מסוים" השופט בך , ביהמ"ש העליון, ע"א 70/88 שושנה פז נ' חנה אלון ואח', פ"ד 44(3) 32

"In principle, there is no problem with the court accepting an expert's opinion, who works in this field either as a professional or as an amateur, as long as he has enough knowledge or practice in a specific subject." HCJ, HHJ Bach, CA 70/88 *Shoshana Paz v. Hana Alon and Others,* PD 44(3)32

In this verdict, the judge ruled that the expert does not have to be trained by a recognized institution and there is no problem that his qualification is a result of self-learning.

Immunity of the Expert

The following is another example of the range of the professional responsibility of the expert. A handwriting expert came to the conclusion that a signature was forged. Based on this conclusion, the client started the long process of litigation, including the gathering of witnesses. This caused the client great financial expense. Although there was no issue of qualification, the court did not accept the opinion of the client's expert, but accepted instead the opinion of the opposing expert. The client intended to prosecute his expert, claiming that the expert was somehow negligent.

The question of whether a client can prosecute a witness for causing him damage because of perceived negligence, which had been raised several times previously, elicited this 1976 decision from the Israeli Supreme Court:

"כדי לקיים משפט הוגן בין אדם לחברו או במשפט פלילי, יש להגן על העדים שיתנו את עדותם באופן חפשי ללא פחד מפני התנכלות להם...על המדינה לנצור מכל משמר את החופש של העדים ולשחררם מכל לחץ ואיומים."

השופט העליון זוסמן, ע"א 752/74 מרדכי רויטמן נ' בנק המזרחי המאוחד בע"מ פ"ד כט (2)057

"In order to hold a fair trial between people, or in a criminal trial, witnesses should be protected, so they can give their testimony freely without fear of persecution...The state is obliged to hold, at all costs, the freedom of witnesses and release them from any pressure or threats." HCJ, HHJ Zusman, CA 752/74 *Roitman v. Bank Hamizrahi and Others,* PD (2)057

In other words, when someone testifies in court, he has the immunity of the court.

In a later verdict, the District Court's judge ruled that we should not relate to an expert witness as we relate to an ordinary one:

"מומחה מוסר עדות שרובה היא עדות סברה המתבססת על ניתוח מקצועי של הנתונים העובדתיים המובאים לפניו. היינו, העד המומחה חובש שני כובעים: בכובעו האחד של המומחה והשני של העד. אין חולק שכובעו כמומחה הוא כובעו העיקרי ואילו כובעו כעד הוא תפקידו המשני והנלווה, ומשום כך, לדעתי, אין לראות את עדות המומחה כעדותו של עד רגיל ולהסיק שכפי שמוקנית חסינות לעד המעיד בהליך משפטי, כך יכול גם המומחה לחסות תחת צילה של חסינות זו באופן מוחלט... סבורה אני שיש ליתן משקל לשמירה על מערך הרתעתי שיביא ליתר מודעות, ליתר תשומת לב וליתר זהירות של המומחה המחייבים הכרה באחריותו במצבים קיצוניים בהם יוכח, שנהג ברשלנות רבתי." בימ"ש מחוזי, השופטת הילה גרסטל, ת"א 3754-10-07 ד"ר בני וגנר נ' ד"ר אריק כהן אדד

"The majority of the expert's opinion is a reasonable explanation, which is based on the professional analysis of the factual data. Namely, an expert witness wears two hats: one hat of an expert and a second hat as a witness. No one disputes that the specialist's hat is the primary one and the hat as a witness is his secondary role. Therefore, in my opinion, an expert's testimony is not the same as an ordinary witness and we shouldn't conclude that, as immunity is granted for witness while testifying in a legal proceeding, the expert can also shelter under the shadow of this immunity... I believe that weight should be given to maintaining a deterrent system that will bring more awareness, more attention and more caution of the expert, requiring recognition of his responsibility in extreme situa-

tions in which his negligence is proved." MC Tel Aviv, HHJ Gerstel Hila, CC 3754-10-07 *Dr. Beni Vagner v. Dr. Arik Choen-Adad*

Opinions Based on Copies

Handwriting experts and document examiners encounter situations where original documentation is not available, for whatever reason. Nevertheless, they are still obligated to give professional, scientific opinions based on machine-generated or photocopied documents.

In 2005, the Israeli District Court ruled:

"קביעה של המומחה כי אדם לא חתם על מסמך מסוים, בעוד שהבדיקה נעשתה מתוך העתק צילומי... מן הראוי שהספק יוזכר במסקנותיו הסופיות של המומחה, כמו גם עובדה כי ישנם מאפיינים רבים שלא היה באפשרותו של המומחה לבדוק מצילום, כגון לחץ הכתיבה"

כב' השופטת רחל ערקובי, ת"א 25678/03 מגדל חב' לביטוח נ' סבן יואב 05 (11) 130

"When an expert makes a decision that the party in question did not sign a certain document, based on a copy of the original document...it is appropriate that the expert should mention a doubt in his final conclusion, including the fact that there are some characteristics he could not analyze from the copy, such as pressure of the writing." MC Tel Aviv, HHJ Arkubi, CC 25678/03 *Migdal Insurance Company v. Saban Yoav*, 130(11)05

Handwriting experts who examine non-original documents may not be able to reach conclusive opinions, if the quality of the copies is poor. In such cases, they should include reasons for doubt, list identification characteristics that could not be analyzed, and indicate lower levels of certainty. Those who are employed by the forensic department of the police use seven levels of certainty (four positive and three negative); however, because there's no rule about it, handwriting experts may use different scales of certainty, according to individual preference. Most private-practice experts in Israel use five levels of certainty, each of which can be positive or negative, essentially resulting in ten levels of certainty.

Ordway Hilton relates that original documents may have evidence that has been erased, or sections that were deleted by white-out material, or assembled by cutting and pasting from other documents. Any of these manipulations can be difficult to detect when examining photocopies, making proof of fraud difficult.[4]

Clarity of the Report

The Israeli courts accept the opinions of court-appointed experts, unless the experts' opinions are not presented in a clear, detailed and organized way. Below is a quotation of an Israeli court decision from 2005:

"כאשר מומחה שמונה על ידי בית המשפט מגיש חוות דעת שאינה ערוכה בצורה מאורגנת ובהירה, כך שאינה מאפשרת להתרשם ולהבין כיצד הגיע למסקנה, אזי בית המשפט יעדיף לקבל את חוות הדעת של אחד הצדדים, ולא את חוות הדעת של המומחה מטעמו" כב' השופטת רחל ערקובי, ת"א 25678/03 מגדל חב' לביטוח נ' סבן יואב 05 (11) 130

"When an expert, who is appointed by the court, delivers an opinion in a way that is not clear enough and is not detailed or organized, it does not enable the court to understand how the expert reached his conclusion; then, the court can give preferential weight to the report of one of the sides, rather than to the report of the expert appointed by the court." MC Tel Aviv, HHJ Arkubi, CC 25678/03 *Migdal Insurance Company v. Saban Yoav*, 130(11)05

The Influence of the Judge's Opinion of the Expert in a Prior Case

Not all the judges are aware of the following Supreme Court ruling regarding an expert's credibility. Some judges still allow lawyers to attack opposing experts by quoting other judges' opinions from prior trials.

To avoid this unwarranted complication, a handwriting expert should always provide the lawyer this 1990 Supreme Court verdict which states the attitude of the Israeli courts that the credibility of the expert witness should not be affected by a prior trial, in which the judge discredited the expertise of the expert. HCJ, HHJ Heshin, CA 2275/90 *Lima v. Rozenberg*, PD 47(2)606, 614

4 Hilton, Ordway. *Scientific Examination of Questioned Documents*, pp. 122, 348-388.

Cases Involving a Language Foreign to an Israeli Judicial Graphologist/Document Examiner

A 1992 verdict in the Israeli Supreme Court states the following:

"אי ידיעת השפה בה נכתבה החתימה, אינה פוגמת או מחלישה את חוות הדעת"
כב' השופט מצא, ע"א 4200/92 נינט אשרם מעלוף נ' וידאר איסקנדר מעלוף. פ"ד מ"ז (ד) 780

"The fact that the expert doesn't know the language the signature was written, does not impair or weaken the expert's report." HCJ, HHJ Maza, CC 4200/92 *Ninet Arsham Maaluf v. Vidar Iskandar Maaluf,* PD 47(4)780

This author believes that when a handwriting expert is retained to examine legible foreign language signatures or handwriting, it is his moral obligation to research the copybook writing style of the language that he does not know, to acquire more information for use in forming a reliable opinion. Sometimes it is also prudent to have the foreign language translated. The most important aspect of examining handwritings and signatures written in a foreign language is to understand the copybook formations, where the letters begin and end, and the direction of the lines and the writing.

Summary

The Israeli courts regularly accept judicial graphologists as experts, whether or not they are court appointed. Most of the judges do not give preference to document examiners from the government agencies, and make decisions and rule by the quality of the report and testimony, even if given by an autodidactic graphologist. Witnesses who have testified in court have immunity from being sued, but experts cannot have the same immunity, if negligence is proved. While the Israeli courts accept opinions based on non-original documents, the expert should be responsible for expressing levels of certainty in these instances. In a few cases, the Israeli courts have not accepted the court-appointed expert's opinion, when the report was not detailed, clear and concise. Handwriting experts and document examiners can successfully analyze handwriting in a foreign language, providing they have acquired knowledge of the copybook style and other pertinent writing characteristics of that particular language.

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Pnina Arieli has worked as a graphologist for nearly 25 years. She is the owner of The Institute of Graphological Analysis, which serves many large companies in human resource screening. During the last 12 years, she has specialized in scientific examination of documents and handwriting and presently works full-time in this field.

As a court recognized judicial graphologist, Ms. Arieli she has been appointed by the Israeli courts approximately 90 times and has testified over 70 times in the Israeli magistrate and district courts. She was a presenter at the 2010 National Association of Document Examiners conference in Portland, Oregon and has lectured at numerous Israeli area bar association meetings.

Ms. Arieli has published numerous articles in various attorney magazines and on general interest websites. She also functions as the adviser to a lawyer website, http://www.mishpati.co.il, in the judicial graphology forum.

Pnina Arieli
Ceasarea, Israel
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Deception and Forgery on Maui—The Case of Michael L. Mason

Randolph Mason, et al. v. Timothy Olson, Civil No. 08-1-0138(1)

by
Reed Hayes, CDE

Background

Michael L. Mason ("Michael") passed away from AIDS-related complications in 2007 on the Island of Maui, Hawaii. About two years before his death, Michael met up with one Timothy Olson who won his trust and soon became a live-in "caretaker." After Michael's death, his brother Randolph "Randy" Mason realized there were serious discrepancies involving Michael's bank account, property, and other personal matters. He suspected that Olson had been forging Michael's signature on checks and legal documents and, armed with other evidence, hired attorney John H. Price of Honolulu to take legal action.

Primary Questioned Document

Of utmost concern to Mr. Mason and his attorney was a notarized General Power of Attorney dated April 10, 2006 (hereinafter referred to as Q-1) bearing a "Micheal L. Mason" (sic) signature. Essentially, the document gave Timothy Olson "full power to do and perform any and all acts" including paying Michael's bills, receiving any income owed to him, and generally handling his personal affairs. This also gave Olson free access to Michael's bank account.

Comparison Material

For comparison purposes, Mr. Mason provided copies of three documents bearing a total of four signatures known to have been written by his brother. No additional comparison material was available and no original documentation could be located. The comparison documents included Michael's Last Will and Testament dated January 21, 2006 (signed twice), a warranty deed dated April 20, 2004, and a warranty deed dated June 1, 1995. The Michael Mason questioned and known signatures are illustrated in Figure 1.

Randy Mason also provided a total of seven documents written and/or signed by Timothy Olson. Additionally, he submitted medical records pertaining to Michael's hospitalization at the time the questioned document was allegedly signed.

Assignments

My first assignment was to determine whether Michael Mason signed the questioned General Power of Attorney. If I discovered that he did not, the question then became, did Timothy Olson forge Michael's signature? I was also asked to examine signatures on various checks drawn on Michael's account to determine if in fact he wrote and/or signed the checks or if Mr. Olson did.

Observations and Findings Pertaining to Questioned General Power of Attorney

The signature in question is written with firmer strokes and more consistent pressure than Michael's known signatures, particularly those written approximately three months earlier. (Note that I was initially provided with photocopies of all documents but examined the original questioned signature immediately prior to trial. The firmness of the questioned signature is more apparent in the original than in the copies shown here.) At the time the General Power of Attorney was allegedly signed, Michael's medical records indicate he was suffering from a number of illnesses, including neurological deficits; he was also "agitated and confused." It is reasonable to believe that his signature during his hospital stay would have been at least as weak as the signatures he affixed to his will, unless he had realized considerable recovery from his illnesses by that time, only a few months later. If he was indeed "agitated and confused," this would likely have had a negative impact on his writing skills as well.

Numerous other discrepancies between the questioned and known signatures surfaced during

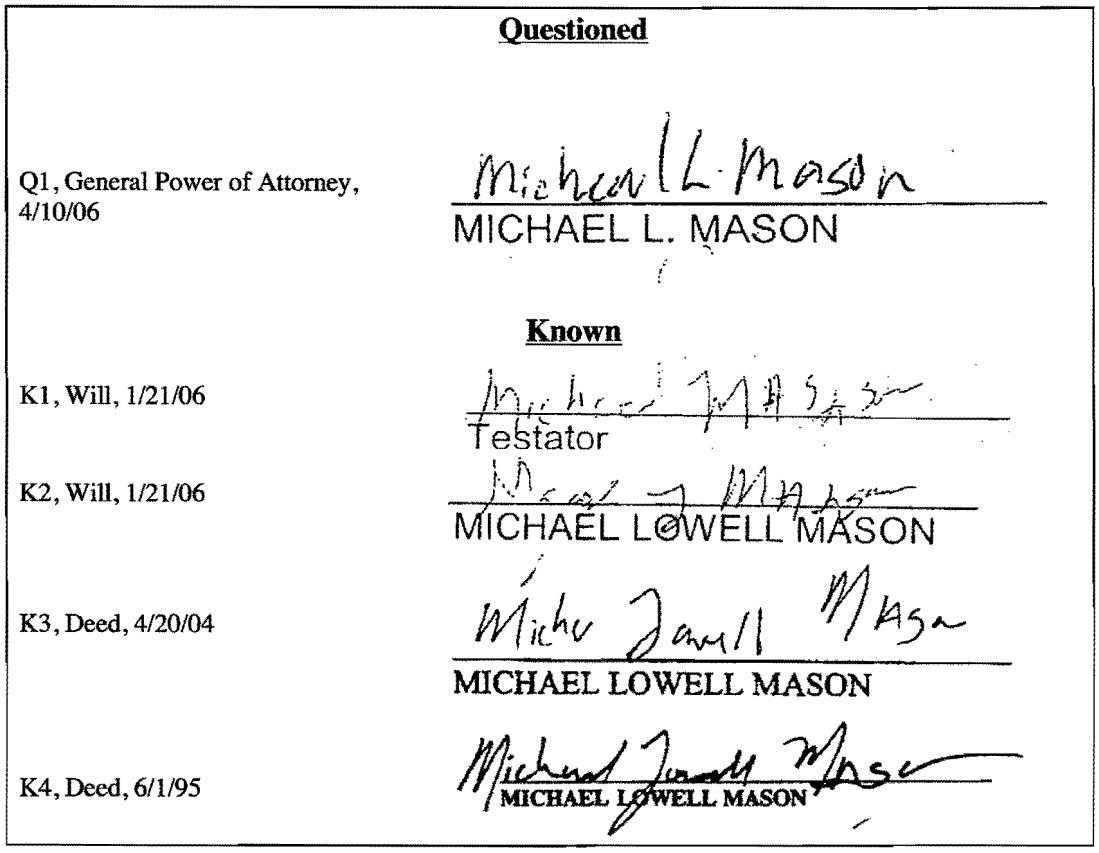


Fig. 1—Questioned Signature and Michael Mason's Known Signatures

my examination, as indicated on the two comparison charts included as Figures 2A and 2B.

Interestingly, in the questioned signature, Michael's name is misspelled "Micheal." (This misspelling is also evident on many of the questioned checks.) Further, the hospital records indicate that on the date the questioned document was allegedly executed, both of Michael's wrists were restrained and there is no evidence that the restraints were ever removed on that date. On the day prior to the date of the General Power of Attorney, there is an entry on a hospital form which reads "Unable to sign." While this information regarding Michael's inability to sign was not utilized in reaching my conclusion as to the authenticity of the General Power of Attorney signature, it nevertheless served to confirm that he did not sign his name to that document.

Having concluded that Michael Mason did not sign the General Power of Attorney, I then considered whether Timothy Olson signed the document using Michael's name. Based on Olson's handwriting and signatures on the comparison documents provided, there is strong evidence he did. The fact that both Michael's and Olson's name end with "son" made for easier comparison. Also, the limited number of potential writers helped narrow down the suspects. Similarities between Olson's writing and the signature in question are demonstrated on the comparison charts at Figures 3A-3C.

Additional Questioned Material

Randy Mason became further suspicious when he realized numerous checks for large sums of money had been written on Michael's checking account, even before the General Power of Attorney was executed. In fact, within a period of a few months after the power of attorney was signed, the account had been suspiciously drained.

Mr. Mason presented a total of 23 checks written on Michael's account between August 2005 and August 2006. He suspected that many of them

Comparison Chart 1 - Questioned Signature Compared to Michael Mason Known Signatures

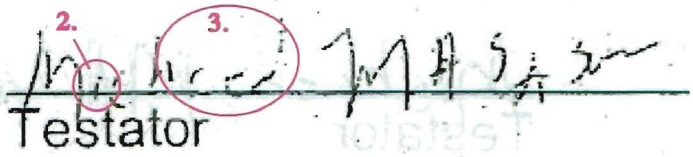
1. Note overall strength and consistency of pressure of Questioned signature versus weak, variable Knowns.
2. Difference in "i" dot presence and shape.
3. Questioned "Michael" complete versus incomplete Known "Michael."
4. Different shape of middle initial "L."
5. Dot after "L" in Questioned; no dot after "L" in K-2.

Questioned

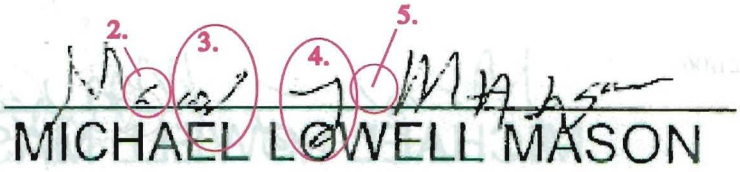
Q-1, General Power of Attorney, 4/10/06

Known

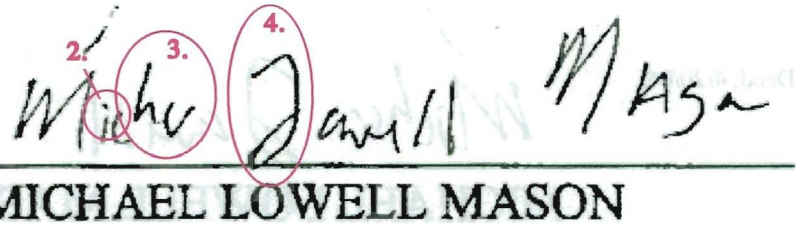
K-1, Will, 1/21/06



K-2, Will, 1/21/06



K-3, Deed, 4/20/04



K-4, Deed, 6/1/95

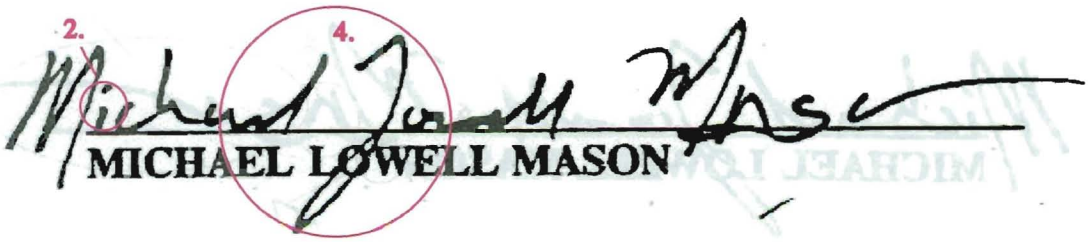


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Fig. 2A—Questioned Signature Compared to Known Signatures

Comparison Chart 2 - Questioned Signature Compared to Michael Mason Known Signatures

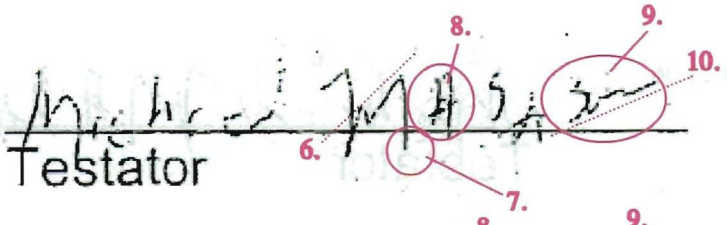
6. "M" in "Mason" slopes downward in Questioned, upward in Knowns.
7. Final stroke of "M" pulls forward in Questioned, downward in Knowns.
8. Different form for "a" in "Mason."
9. Different formation for "son."
10. Questioned "son" remains relatively level; Knowns slant upward.

Questioned

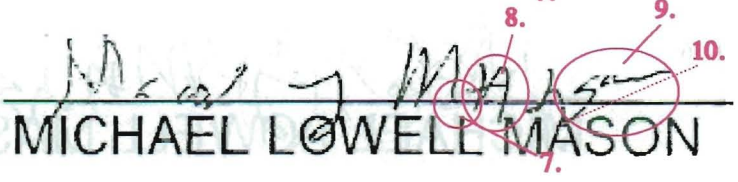
Q-1, General Power of Attorney, 4/10/06

Known

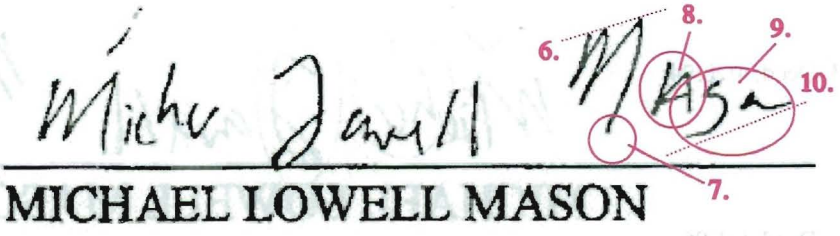
K-1, Will, 1/21/06



K-2, Will, 1/21/06



K-3, Deed, 4/20/04



K-4, Deed, 6/1/95

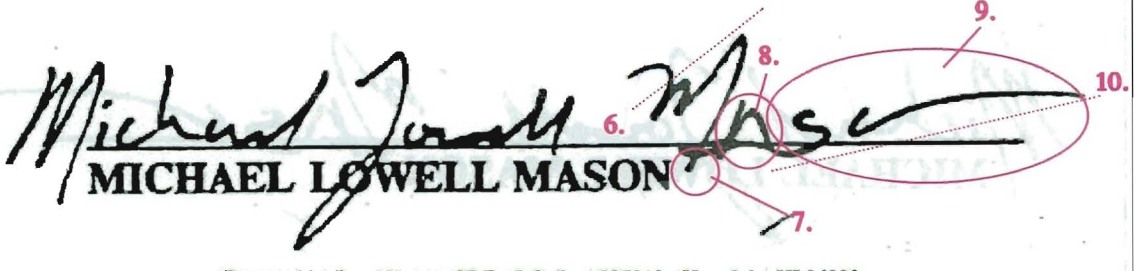


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Fig. 2B—Questioned Signature Compared to Known Signatures

had been written and/or signed by Timothy Olson, and he therefore requested an examination of the checks to include comparison with Olson's writing. On several of the checks, "Michael" was misspelled "Micheal."

Of 23 checks, I determined that four (possibly six) were signed by Michael Mason. Fifteen checks were certainly signed by Timothy Olson, and at least two others were probably signed by him. A conclusion could not be reached regarding two of the check signatures due to substandard copies.

Trial

Trial was held in the courtroom of Honorable Joel August in Second Circuit Court, State of Hawaii, in Wailuku, Maui on July 28, 2009. I was called by Randy Mason's attorney, John Price, to testify as to the above-noted findings. I testified that Timothy Olson had forged Michael Mason's name on the General Power of Attorney and had also filled out and signed several checks written on Michael's account.

Judge August, rightfully concerned about the misspelling of Michael's name on the General Power of Attorney and on several questioned checks, asked for my opinion in that regard while I was on the witness stand. My response was that, because the spelling of one's name is habitual, it is highly unlikely that Michael would suddenly and repeatedly misspell his own name, unless he were suffering from dementia or some other mental disorder.

Opposing counsel's cross-examination was not particularly strong. He tried unsuccessfully to get me to admit that I had reached my opinion of inauthenticity regarding the General Power of Attorney signature based on indications in the medical records that Michael's wrists were restrained and he was "unable to sign" the day before the General Power of Attorney was executed.

The person who supposedly notarized the General Power of Attorney testified before me. Under pressure, she admitted she did not witness Michael sign the questioned document.

Mr. Olson did not appear to have a solid defense against the forgery allegations. Following presentation of the evidence, the court gave him 30 days in which to prepare a brief showing his innocence, but he was unsuccessful in doing so.

Conclusion

After Judge August reached his conclusions, Mr. Price wrote a letter to me stating the following:

"The Second Circuit Court has issued its Findings of Fact and Conclusions of Law concerning the above-referenced matter. I am pleased to be able to inform you that the court found your testimony to be convincing and compelling in all respects. Specifically, the court found that Mr. Olson had begun signing Mr. Mason's name on checks beginning in late 2005, exactly as you described in your testimony. The court further found, based on your testimony, and directly contrary to the testimony of Mr. Olson and the notary public, that the power of attorney was a forgery, and that Mr. Olson had signed Mr. Mason's name thereon. It is quite remarkable to note that it was your opinion alone which overcame the contrary testimony of the notary public, who swore she verified Mr. Mason's identity when notarizing the document, and the testimony of Mr. Olson who swore that Mr. Mason signed the power of attorney. Testimony just doesn't get more convincing than that." (Emphasis added.)

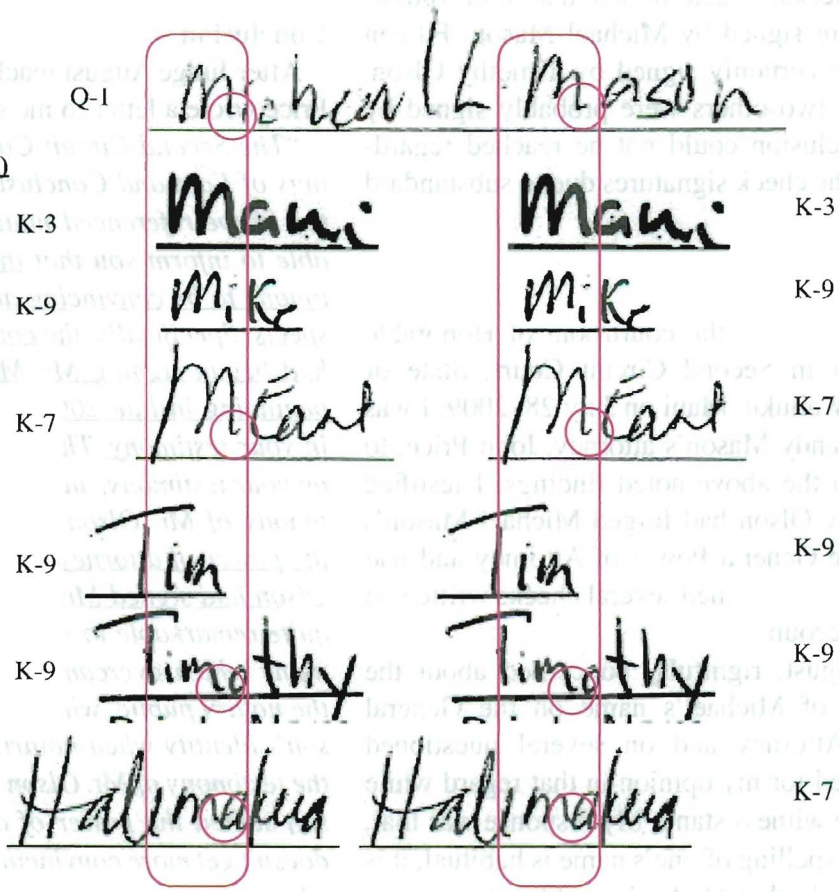
The outcome of this case was truly rewarding in that Mr. Olson was found guilty. More importantly, the Mason family was finally able to find closure to this difficult and stressful ordeal involving their terminally ill family member who had been victimized by Olson.

Comparison Chart 3 - Questioned Signature Compared to Timothy Olson Known Writing

Questioned

Q-1

Known (Olson)



Note similarity in shape of letter "M" as well as hooks at bottom right.

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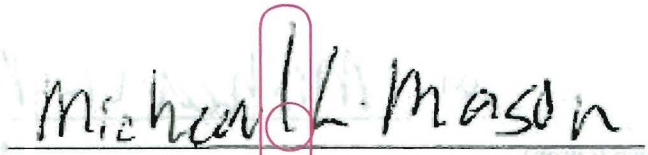
Fig. 3A—Questioned Signature Compared to Timothy Olson Known Handwriting

Comparison Chart 4 - Questioned Signature Compared to Timothy Olson Known Writing

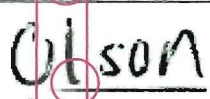
Questioned

Q-1



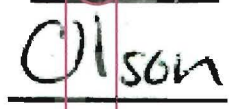
Known (Olson)

K-9



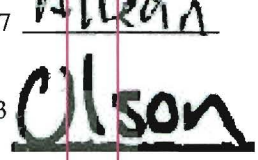
K-9

K-9



K-7

K-3



K-3

K-3

K-1

Note similar shape and curvature of letter "l" as well as hooks at bottom.

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Fig. 3B—Questioned Signature Compared to Timothy Olson Known Handwriting

Comparison Chart 5 - Questioned Signature Compared to Timothy Olson Known Writing

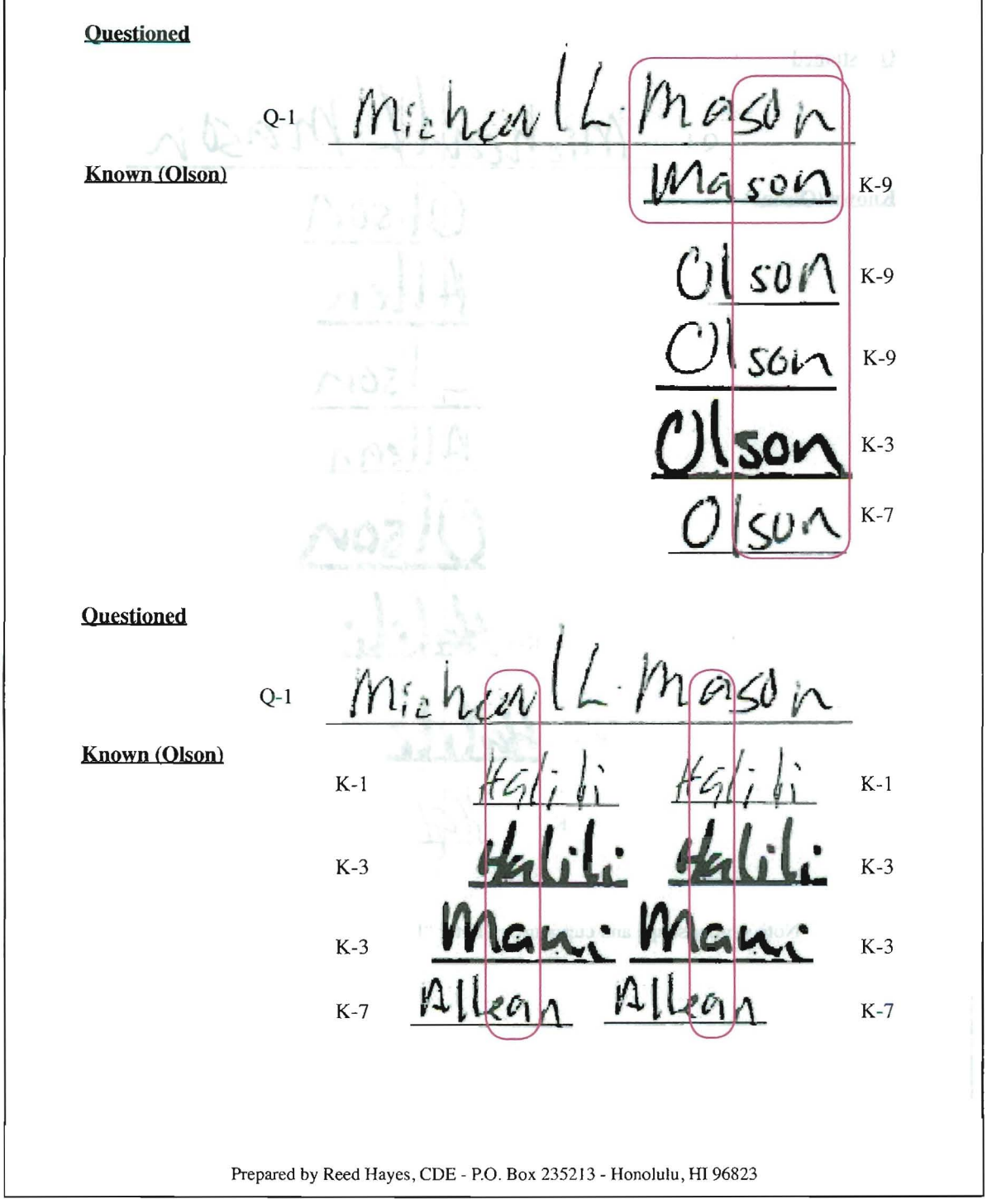

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Fig. 3C—Questioned Signature Compared to Timothy Olson Known Handwriting

Reed Hayes, CDE operates a handwriting and document examination business in Honolulu, Hawaii. He has studied handwriting for over four decades and has worked internationally as a handwriting expert, including acting as a consultant for the book and video production of *The Diary of Jack the Ripper* (Smith Gryphon Publishers, London, 1993).

Mr. Hayes is a graduate of the Andrew Bradley Training Courses in Forensic Document Examination (beginning and advanced) and holds a certificate of training from the American Institute of Applied Science. He received certification from the National Association of Document Examiners in 2001 and was re-certified by NADE in 2006 and again in 2011. He has testified in numerous trials in the state of Hawaii and in Guam.

He is the author and co-author of several books, including *Forensic Handwriting Examination: A Definitive Guide*, as well as several articles published in peer-reviewed journals. As a frequent lecturer about forensic handwriting work, Mr. Hayes was a presenter at the 2001 NADE conference in Crawley (London), England, and the 2002 NADE conference in Ann Arbor, Michigan.

Mr. Hayes teaches a *Training Course in Questioned Handwriting and Document Examination* to students in the U.S. and abroad. He serves as the educational chair of the Scientfic Association of Forensic examiners and is currently the Editor-in-Chief of NADE's Journal.

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Case Study: Confessions in a Murder Trial

by
Patricia Siegel

This article reviews the handwriting elements of confessions in a high profile criminal case in which Lee Woods, along with two other defendants, were accused of murdering one police officer and wounding another during a traffic stop

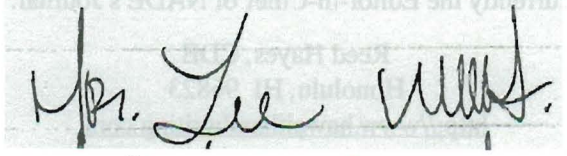


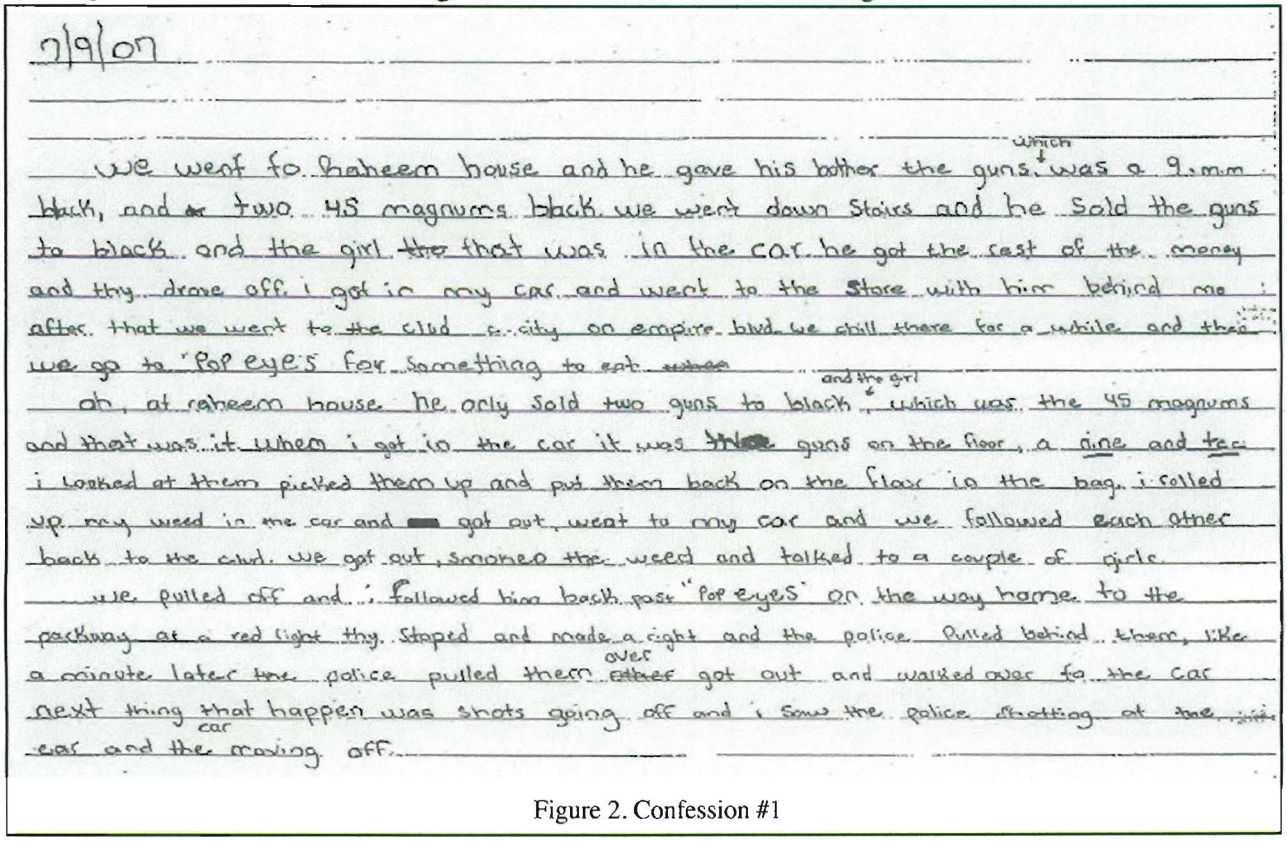
Figure 1. Lee Woods Signature

in Brooklyn, NY in 2007. Both officers were shot at close range from a car. The question brought to me, as a handwriting examiner, was: Did Lee Woods write the two confessions, or were they written instead by one of the two detectives who interrogated him? Patrick Megaro, Lee Woods' attorney, believed the handwriting on the confessions looked considerably different from Lee Woods' usual writing. The two confessions were dated on consecutive days. I was retained to determine who wrote them.

I examined known handwritings of Lee Woods from letters he wrote to girlfriends and request exemplars obtained by Mr. Megaro who dictated the confessions to Mr. Woods. I also examined copies of the handwritings of the two detectives who interrogated Mr. Woods and compared those handwritings with the confession handwritings.

Lee Woods and two other defendants, all tried separately, were driving when they were pulled over by police. Woods, a police informant with a long criminal record, claimed he was the driver of the car and did not shoot the officers. Another defendant also claimed he was the driver.

When Mr. Megaro met with Lee Woods after his



2/9/07

we went fo. raheem house and he gave his bother the guns, which was a 9.mm black, and two 45 magnums black. we went down Stairs and he Sold the guns to blacks and the girl that was in the car. he got the cast of the money and thy drove off. i got in my car and went to the Store with him behind me : after that we went to the cluld c.city on empire blvd. we chill there for a while and then we go to "Pop eye's for Something to eat

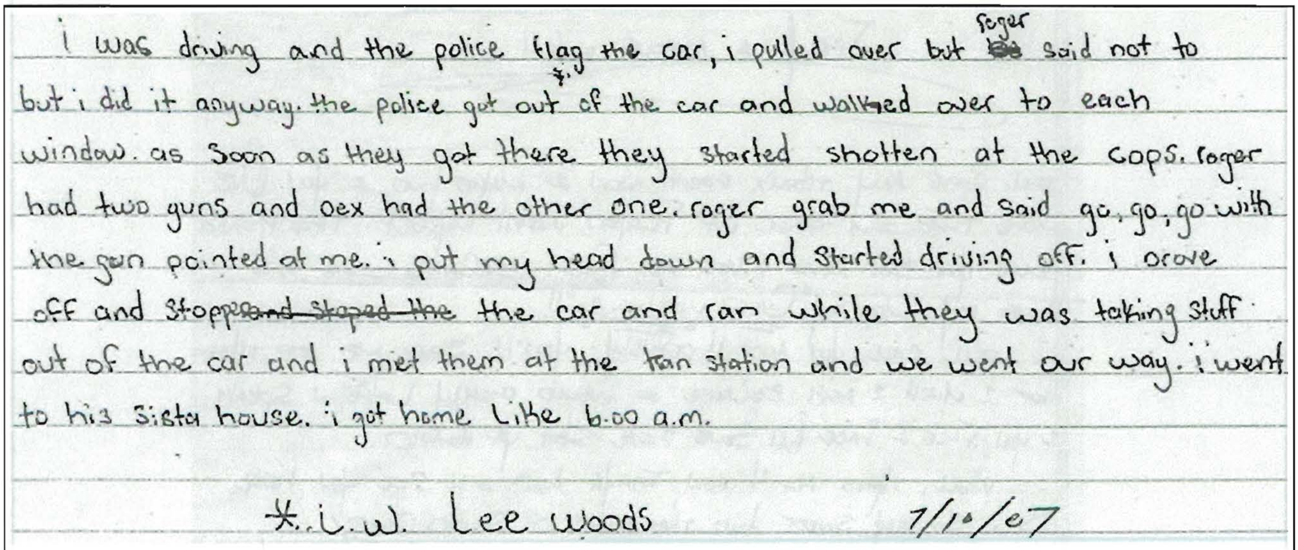
and the girl

ah, at raheem house he only sold two guns to black, which was the 45 magnums and that was it. when i got in the car it was guns on the floor, a nine and two i looked at them picked them up and put them back on the floor in the bag. i rolled up my weed in the car and got out, went to my car and we followed each other back to the club. we got out, smoked the weed and talked to a couple of girls

we pulled off and i followed him back past "Pop eyes" on the way home. to the parkway at a red light thy. Stoped and made a right and the police pulled behind them, like a minute later the police pulled them over either got out and walked over to the car

next thing that happen was shots going off and i Saw the police shotting at the car and the moving off.

Figure 2. Confession #1



i was driving and the police flag the car, i pulled over but roger said not to but i did it anyway. the police got out of the car and walked over to each window. as Soon as they got there they started shotten at the cops. roger had two guns and oex had the other one. roger grab me and said go, go, go with the gun pointed at me. i put my head down and Started driving off. i drove off and Stopp~~and stoped the~~ the car and ran while they was taking stuff out of the car and i met them at the tan station and we went our way. i went to his sista house. i got home like 6.00 a.m.

*.L.W. Lee Woods 7/10/07

Figure 3. Confession #2 (Date not written by Woods)

arrest, he saw that the defendant had been beaten. According to Megaro, "[Woods] was not given medical treatment for the 36 plus hours he was held in the NYPD Precinct house. When I got there, I saw some bruising and a big lump on his head. Plus he was missing some of his dreadlocks and complaining about severe pain to the groin from being kicked...He had a look of terror in his eyes and was blubbering like a baby when he described how police tortured him." Prior to this, his attorney had only seen Mr. Woods as a smooth talker with a cocky tough-guy image.

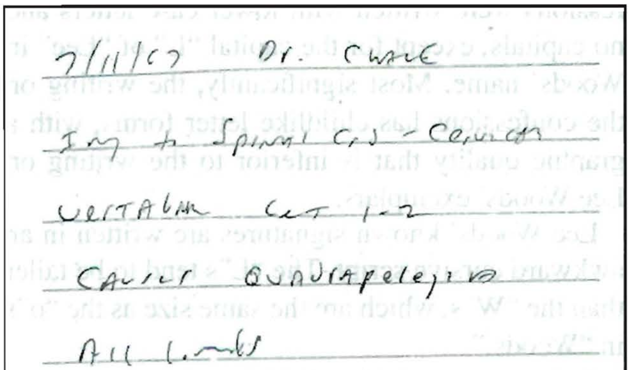


Figure 4. Handwriting of Detective #1

After comparing the confessions with the handwritings of the two detectives, I determined that neither detective wrote the confessions.

Reaching a conclusion about whether or not Lee Woods wrote the confessions, however, was not simple. Based on the exemplars I received, Mr. Woods wrote in two very different handwriting

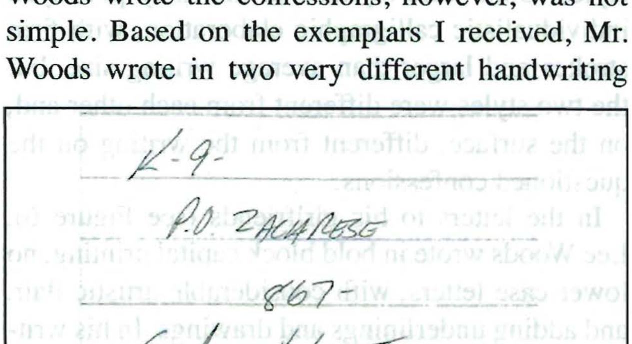


Figure 5. Handwriting of Detective #2

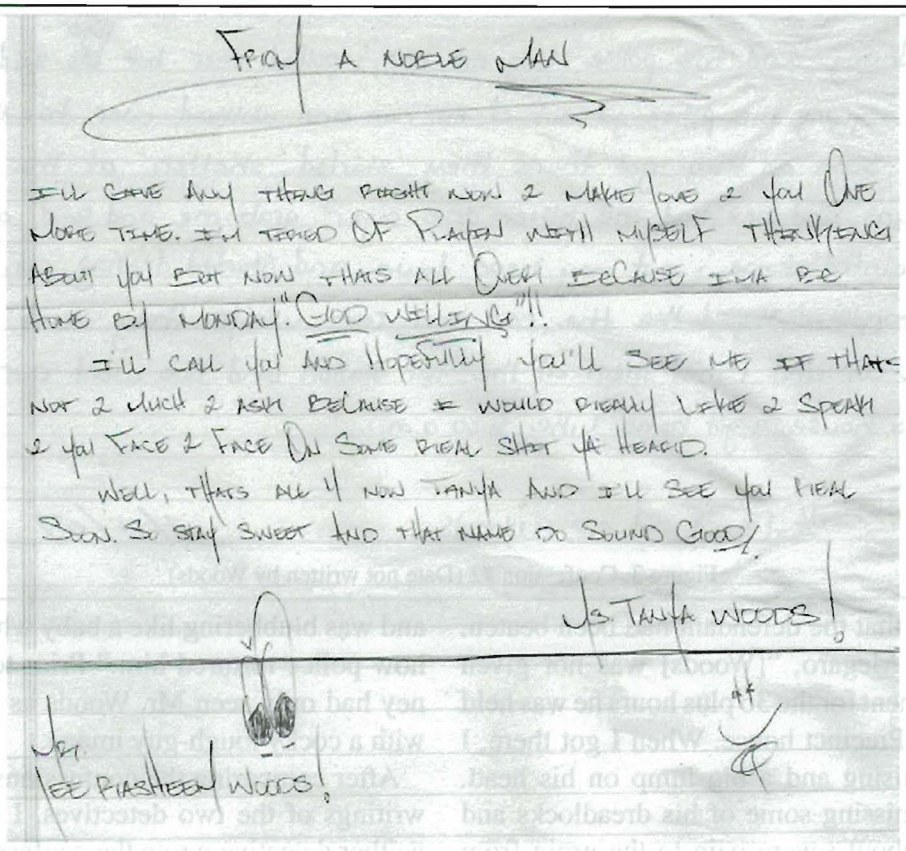


Figure 6. Lee Woods Writing on Letter to Girlfriend

styles. Both were stylized in that they portrayed individualistic calligraphic elaboration, with firm strokes and larger than average writing size, but the two styles were different from each other and, on the surface, different from the writing on the questioned confessions.

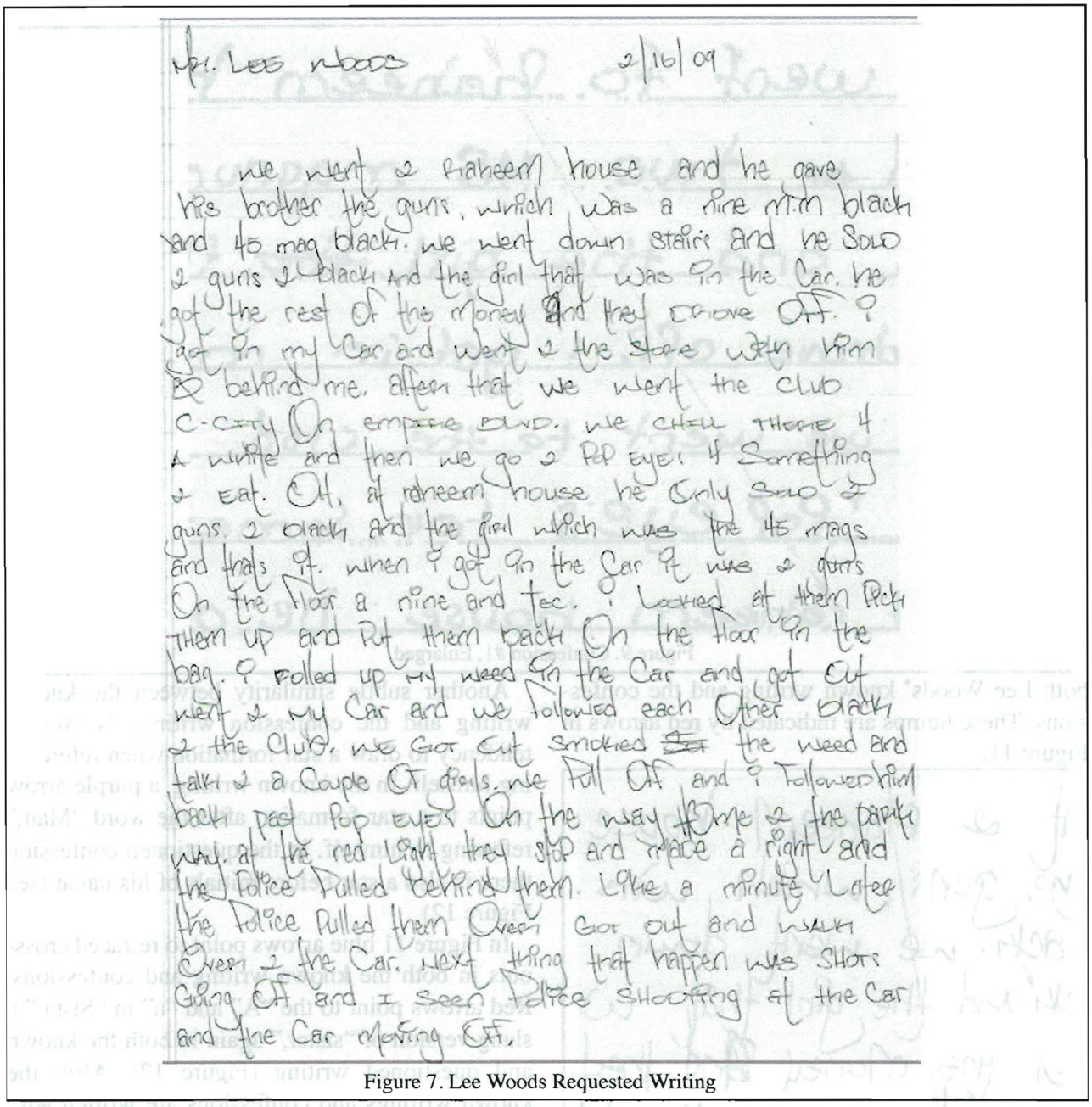
In the letters to his girlfriends (see Figure 6), Lee Woods wrote in bold block capital printing, no lower case letters, with considerable artistic flair, and adding underlinings and drawings. In his writing on the requested exemplars (Figure 7), he used elaborate lower case letters with large capitals at the beginning of many words, artistically stylized circle "i" dots, and narrow or no margins. Both of his known writing styles, although different from each other, were similar to the extent they exhibited well-developed motor control, an attempt at artistry, and exaggerated letter forms.

The handwriting on the confessions, however, was smaller than the known exemplars and written with a shaky and insecure stroke quality. The confessions were written with lower case letters and no capitals, except for the capital "L" of "Lee" in Woods' name. Most significantly, the writing on the confessions has childlike letter forms, with a graphic quality that is inferior to the writing on Lee Woods' exemplars.

Lee Woods' known signatures are written in an awkward cursive script. The "L"s tend to be taller than the "W"s, which are the same size as the "o"s in "Woods."

The most notable difference between Lee Woods' known writing and the confession writings is the apparent confidence and mature graphic quality with which the known exemplars are executed versus the slow, tremulous and immature graphic writing quality with which the confessions are written. Despite these differences, there are significant similarities that cannot be overlooked.

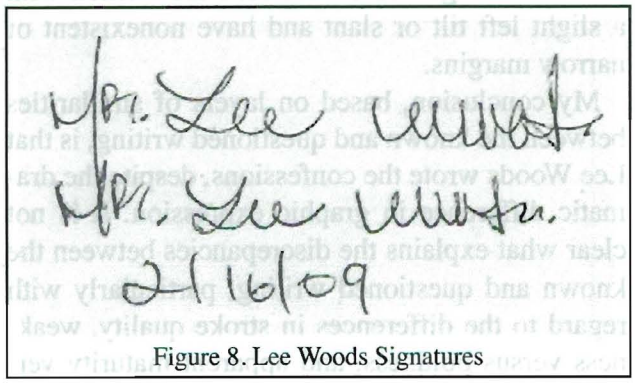
Note in Figure 9 the word "Raheem" written with a capital "R" (red arrow, first line) and the word "raheem" written with a lower case "r" (red



Mr. Lee woods 2/16/09

we went 2 Raheem house and he gave his brother the guns, which was a nine m.m black and 45 mag black. we went down stairs and he Sold 2 guns 2 black And the girl that was in the Car. he got the rest of the money and they drove off. I got in my Car and went 2 the store with him & behind me. after that we went the club C-City On empire blvd. we chill there 4 a while and then we go 2 Pep Eye. 4 Something 2 eat. Oh, at raheem house he Only Sold 2 guns 2 black and the girl which was the 45 mags and thats it. when I got in the Car it was 2 guns On the floor a nine and tec. I looked at them Pick them up and Put them back On the floor in the bag. I Rolled up my weed in the Car and got out went 2 My Car and we followed each Other black 2 the Club. we Got Out Smoked ~~Set~~ the weed and talk 2 a Couple Of girls. we Pull Off and I Followed him back past Pep Eyes On the way home 2 the party way. at the red Light they stop and make a right and the Police Pulled behind them. Like a minute Later the Police Pulled them Over I Got out and walk Over 2 the Car. Next thing that happen was Shots Going Off and I seen Police Shooting at the Car and the Car moving Off.

Figure 7. Lee Woods Requested Writing



Mr. Lee woods
Mr. Lee woods
2/16/09

Figure 8. Lee Woods Signatures

arrow, last line). The capital "R" in "Raheem" alternating with a lower case "r" in "raheem" in the first confession is repeated in Lee Woods' known writing (see Figure 10). This is a highly significant individualistic pattern that is unlikely to be a coincidence, especially when considered in the context of additional common elements between the known and questioned writing.

There is a characteristic enlarged hump or arch in the formation of the "r" and "k" that occur in

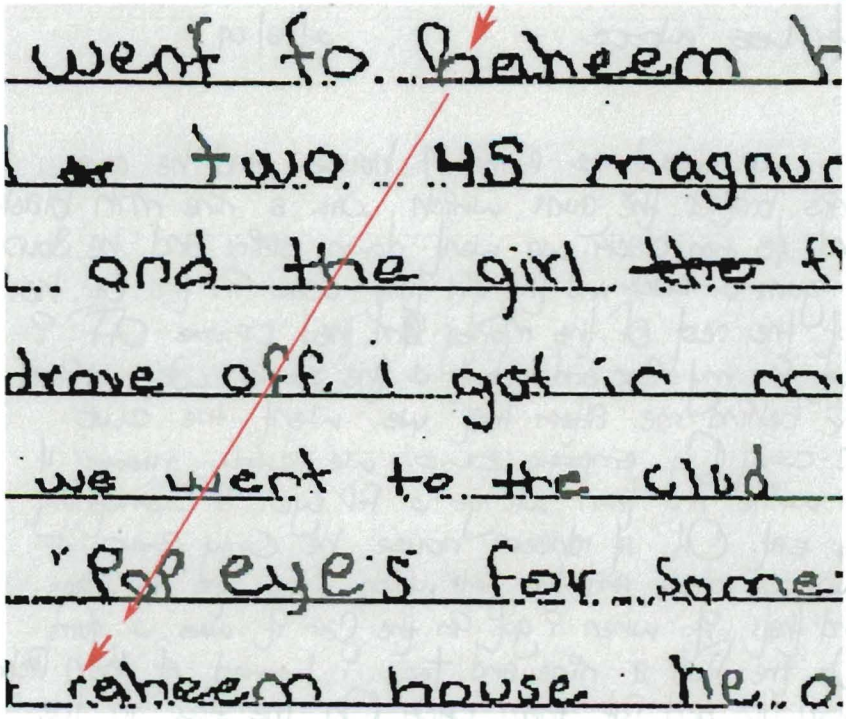


Figure 9. Confession #1, Enlarged

both Lee Woods' known writing and the confessions. These humps are indicated by red arrows in Figure 11.

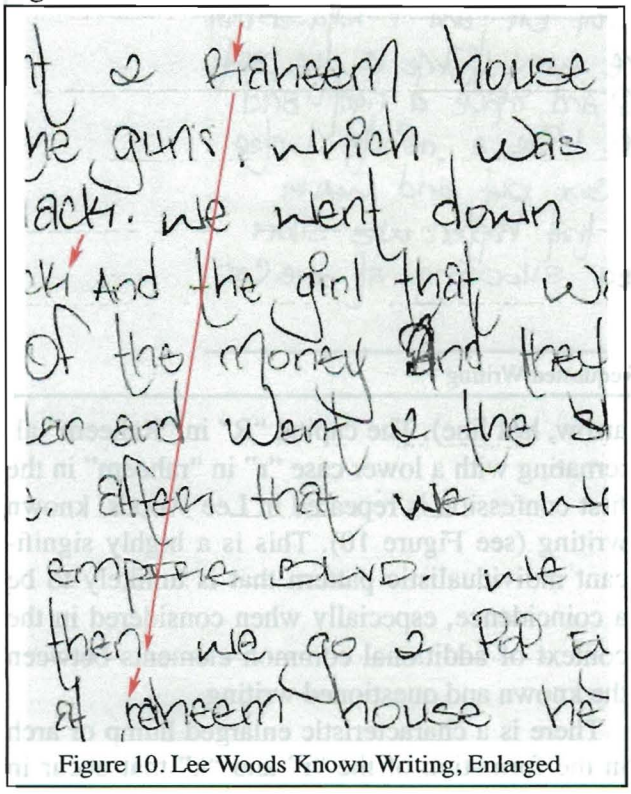


Figure 10. Lee Woods Known Writing, Enlarged

Another subtle similarity between the known writing and the confession writings is Woods' tendency to draw a star formation when referencing himself. In the known writing, a purple arrow points to a star formation after the word "Man," referring to himself. In the questioned confession there is also a star before initials of his name (see Figure 12).

In Figure 11 blue arrows point to retraced cross-outs in both the known writing and confessions. Red arrows point to the "A" and "a" in "Sista," a slang version of "sister," again in both the known and questioned writing (Figure 12). Also, the known writings and confessions are written with a slight left tilt or slant and have nonexistent or narrow margins.

My conclusion, based on layers of similarities between the known and questioned writing, is that Lee Woods wrote the confessions, despite the dramatic difference in graphic expression. It is not clear what explains the discrepancies between the known and questioned writing, particularly with regard to the differences in stroke quality, weakness versus boldness, and apparent maturity ver-

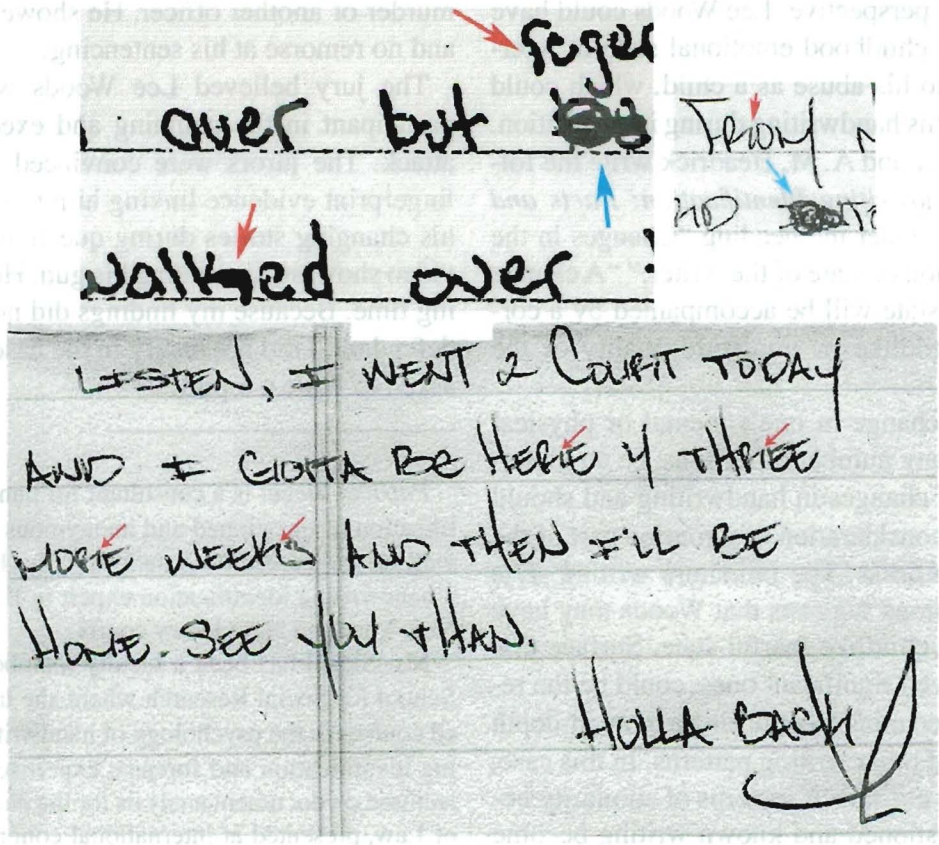


Figure 11. Confession Writing, Enlarged (top)
Compared to Lee Woods Known Writing (bottom)

sus immaturity of the writing styles. It is our responsibility as handwriting examiners to make a determination as to the identity of a writer, but not necessarily to find an explanation for why there are similarities or differences.

However, it might assist in future handwriting identification investigations to consider why. One possibility is that Lee Woods tried to disguise his handwriting on the confessions. That is not likely.

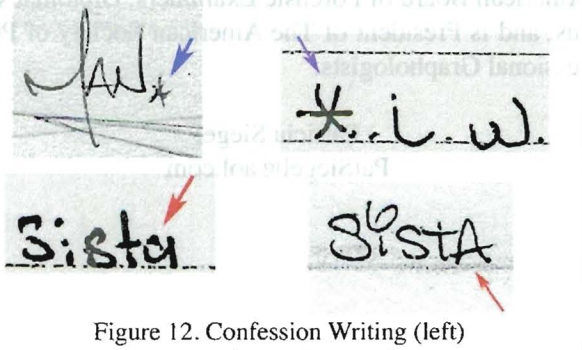


Figure 12. Confession Writing (left)
Compared to Lee Woods Known Writing (right)

The requested writings may have been intentionally disguised, however. They are written in manuscript lettering rather than block capital writing as on the letters to his girlfriends. Mr. Magaro indicated that it took Lee Woods a great deal of time to write the requested writing. Given the relatively high degree of Mr. Woods' writing skill, the slowness implies self-consciousness while producing the request exemplars.

A more likely explanation for the inferior writing on the confessions is that Lee Woods' fearful state of mind probably affected the nature of his writing after the interrogations and claimed beating. According to Mr. Magaro, Lee Woods suffered childhood "neglect, emotional and physical abuse, abandonment..."

Just being aware of the possibility that a beating or severe stress could trigger emotions that stemmed from earlier trauma and/or diminished self-esteem allows the handwriting examiner to

take a broader perspective. Lee Woods could have regressed to a childhood emotional state in interrogation due to his abuse as a child, which could have affected his handwriting during interrogation.

Roy A. Huber and A. M. Headrick write the following in *Handwriting Identification: Facts and Fundamentals* under the heading "Changes in the mental condition or state of the writer:" "A change to a childlike state will be accompanied by a corresponding childlike or immature quality of the writing."

Stress or a change in one's mental or physical state can, for any number of reasons, be an underlying cause of changes in handwriting and should be taken into consideration as a routine part of the examination process. The immature writing style on the confessions suggests that Woods may have regressed to a childlike fearful state. Surface dissimilarities, even significant ones, could be the result of an altered mindset requiring a more in-depth examination of other writing patterns. In this case, inconspicuous clusters of patterns of similarity between the questioned and known writing become more significant than the obvious dissimilarities.

Whatever the explanation for the change in writing, what is emphasized here is that the forensic expert needs to look beyond what seems evident on the surface. By focusing on segregated letters or other graphic elements out of context of the writing as a whole, the examiner might miss less conspicuous, subtle aspects of the writing that point to significant similarities. Being aware that emotional disturbance can change an individual's handwriting, particularly under duress, provides one key to solving this puzzle.

Epilogue

What happened to Lee Woods? The jury convicted him as an accomplice in the aggravated murder of the police officer. He was given a life sentence without parole plus forty years for the attempted murder of another officer. He showed no emotion and no remorse at his sentencing.

The jury believed Lee Woods was an active participant in the planning and execution of the attack. The jurors were convinced by DNA and fingerprint evidence linking him to the guns used, his changing stories during questioning, and by a video showing him hiding his gun. He is now serving time. Because my findings did not support the defendant, I did not testify in the case and was not asked to write a report.

Patricia Siegel is a consultant for handwriting identification of questioned and anonymous documents, as well as for handwriting analysis. She has testified as a handwriting identification expert in Federal Court in New York and New Jersey courts.

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